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SUMMER 1971

PREFACE

This volume of the *Military Law Review* is dedicated to Major those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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MILITARY LAW REVIEW—VOL. 53

DEDICATION

Kenneth J. Hodson, B.A., LL.B.
Major General, USA
The Judge Advocate General 1967–1971

This volume of the *Military Law Review* is dedicated to Major General Kenneth J. Hodson upon his retirement after more than 37 years of dedicated military service. Distinguished attorney, avid sportsman, and The Judge Advocate General of the Army 1967–1971—General Hodson served in many ways in his career of 37 years.

An attorney of vision and of the future, he authored the procedural chapters of the Manual for Courts-Martial, U.S., 1951, served on the first Staff and Faculty of the then newly formed Judge Advocate General's School, and was a moving force behind the Military Justice Act of 1968, and the Manuals for Courts-Martial, U.S., 1969 and 1969 (Revised Edition).

A concerned and involved leader, he worked constantly to improve the legal services provided to the Army and its members, and to improve the personal and professional opportunities for the members of his Corps.

This dedicated volume is but a small token of the high professional esteem and sincere personal regard in which General Hodson is held by the members of the Army Judge Advocate General's Corps.

GRANTS OF IMMUNITY AND MILITARY LAW*

By Captain Herbert Green**

The author examines the types and uses of testimonial immunity in civilian and military practice. He traces the development of military immunity noting its weak grounding in statutory law. A concluding section studies the impact of the 1970 Organized Crime Control Act on military immunity practice.

No person . . . shall be compelled in any criminal case to be a witness against himself.[1]

I. INTRODUCTION

"The privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized."[2] The origin of the privilege is found in the 12th century controversies between the King of England and his bishops. Its establishment was not easy as the experiences of those who were defendants before the Star Chamber attest.[3] By the mid 17th century this privilege was established as a rule of evidence of the common law.[4] The struggle to establish the privilege was well known to the authors of our Constitution. So deeply did it impress them that the privilege was "clothed with the impregnability of a constitutional enactment."[5]

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author was a member of the Nineteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any governmental agency.

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1 U.S. CONST. amend. V.

2 E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

3 *Id.*; *see* Miranda v. Arizona, 384 U.S. 436 (1966); Ullman v. United States, 350 U.S. 422 (1956).

4 Griswold, *supra* note 2 at pp. 3–4.

5 Brown v. Walker, 161 U.S. 591, 597 (1896); *see* Mallby v. Hogan, 378 U.S. 1 (1964); Ullman v. United States, 350 U.S. 422 (1956); *see also* Adamson v. California, 332 U.S. 46 (1947).

The privilege applies to a great variety of governmental activities. In addition to all federal and state[6] criminal trials witnesses may invoke it before grand juries,[7] proceedings of administrative agencies[8] and legislative hearings.[9] It is equally applicable to the Armed Forces.[10]

The privilege may be invoked when a witness has "reasonable cause to apprehend danger from a direct answer."[11] Once the privilege is invoked, the trial judge determines if the claim is well taken. The claim must be accepted unless it is "*perfectly clear* from a careful consideration of all the circumstances that the witness is mistaken in the apprehension of self-incrimination and the answers demanded *cannot possibly* have such tendency."[12]

Although the privilege is accorded a liberal interpretation in favor of the right it was intended to secure[13] it may only be invoked to protect an individual from criminal prosecution. Thus, it may not be invoked if the testimony "cannot possibly be used as a basis for, or in aid of a criminal prosecution against the witness."[14] Nor may it be invoked where the statute of limitations has run[15] or where the witness seeks to protect himself from infamy

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[6] Malloy v. Hogan, 378 U.S. 1 (1964).

[7] Stevens v. Marks, 383 U.S. 234 (1966); United States v. Monia, 317 U.S. 524 (1943); United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967). *See* Carter v. United States, 417 F.2d 384 (9th Cir. 1969).

[8] Valeros v. INS, 387 F.2d 921 (7th Cir. 1967); *see* Malloy v. Hogan, 378 U.S. 1 (1964).

[9] Watkins v. United States, 354 U.S. 178 (1957); Poretto v. United States, 196 F.2d 392 (5th Cir. 1952).

[10] UNIFORM CODE OF MILITARY JUSTICE, art. 31; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para. 150; United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Sutton, 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965); United States v. Williams, 2 U.S.C.M.A. 430, 9 C.M.R. 60 (1953); United States v. Wilson, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953).

[11] Hoffman v. United States, 341 U.S. 479, 486 (1951); *see* Haftner v. Appleton, 42 Misc. 2d 292, 247 N.Y.S. 2d 967 (Sup. Ct. 1969). No specific words are necessary to invoke the privilege. All that is needed is that a reasonable man understand that an attempt to invoke the privilege has been made. Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

[12] Commonwealth v. Carrera, 424 Pa. 573, 227 A.2d 627 (1967). *Accord,* Hoffman v. United States, 341 U.S. 479 (1951); Enrichi v. United States, 212 F.2d 702 (10th Cir. 1954); Foot v. Buchanan, 113 F. 156 (C.C.W.D.Miss. 1902); Haftner v. Appleton, 42 Misc. 2d 292, 247 N.Y.S. 2d 967 (Sup. Ct. 1969); The Queen v. Boyes, 121 Eng. Rep. 730 (K.B. 1861).

[13] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[14] Brown v. Walker, 161 U.S. 591, 597 (1896).

[15] *Id.* at 598 and cases cited therein; *see* United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio, 1952).

or disgrace that may result from his answers.[16] If his testimony cannot be used against him in a criminal prosecution, the witness cannot refuse to answer governmental inquiries because "the public has a claim to every man's evidence and no man can plead exemption from this duty."[17] To secure this evidence immunity statutes were passed.[18]

> An immunity act is an act which grants an agent of the government the power to compel a witness to testify about any matter, despite the self-incriminating nature of the testimony. But in exchange for the testimony, the government is disabled from obtaining penal sanctions against the witness for matters revealed by his testimony.[19]

Where the protection afforded by an immunity statute is equal to that afforded by the constitutional privilege, the protection is said to be co-extensive with the constitutional protection and the privilege may not be invoked.[20]

The first part of this article discusses immunity in the federal system. It examines the nature of grants of immunity, substitutes for statutorily authorized grants of immunity; the question of which branch of government has the authority to grant immunity and the immunity problems inherent in the federal-state relationship. The next portion discusses military procedures, policies, and problems involving grants of immunity. The final portion examines the immunity provisions of the Organized Crime Control Act of 1970[21] and its effect on present military immunity procedures.

II. IMMUNITY IN THE FEDERAL SYSTEM

A. *THE NATURE OF FEDERAL IMMUNITY*

The first federal immunity statute[22] was enacted in 1857. It

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[16] Ullman v. United States, 350 U.S. 422 (1956); Smith v. United States, 337 U.S. 137, 147 (1949).

[17] Duke of Argyle in Parliamentary debate quoted in 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton ed. 1961).

[18] Comment, *Federalism & the Fifth: Configurations of Grants of Immunity*, 12 UCLA L. REV. 561, 562 (1965).

[19] Comment, *The Federal Witness Immunity Acts*, 72 YALE L. J. 1568, 1570 (1963).

[20] Immunity statutes offer no protection against perjury committed by a witness testifying under a grant of immunity. Glickstein v. United States, 222 U.S. 139 (1911); Smiley v. United States 181 F.2d 505 (9th Cir. 1950).

[21] 18 U.S.C. §§ 6001–05 (Supp 1970); Pub. L. No. 91–452, (Oct. 15, 1970).

[22] Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

provided that no witness before a House of Congress or committee thereof could refuse to answer any questions pertinent to the inquiry. In return for the testimony it further provided that the witness could not be prosecuted for any "act touching which he shall be required to testify."[23] This immunity, by which a witness is protected from criminal prosecution for any act about which he may testify, is called transactional immunity. The other widely known form of immunity is called use immunity and is composed of two elements. First, the statement of a witness granted use immunity cannot be introduced into evidence against him in a criminal trial. Second, any information gained or derived from his testimony may not be used against him in any form.[24] Thus while transactional immunity acts as a bar to future prosecution, use immunity only insures that the testimony and any information derived therefrom, may not be used in aid of a future prosecution against the witness.

In 1862 Congress adopted the first element of use immunity. It amended the 1857 Act to provide "that the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be *used* as evidence in any criminal proceeding against such witness in any court of justice."[25] This type of immunity, adopting only the first element of use immunity, was incorporated in other statutes[26] and its validity went unchallenged for three decades. The Supreme Court decided that this limited immunity was insufficient to provide protection equal to the privilege against self-incrimination. In *Counselman v. Hitchcock*[27] in response to a subpoena, Counselman appeared before a federal grand jury but refused to answer certain questions. He was subsequently held in contempt by a district court and confined for disobeying the court's order to answer the questions. His application for a writ of habeas corpus was denied by a circuit court and he appealed. Before the Supreme Court he claimed that although his testimony could not be used against him in a subsequent criminal trial, information derived from the testi-

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[23] *Id.* at 156.

[24] *See* People v. LaBello, 24 N.Y. 2d 598, 249 N.E. 2d 414, 301 N.Y.S. 2d 544 (1969), (overruled on other grounds); *Cf.* Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[25] Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (emphasis added).

[26] Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, 383; Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[27] 142 U.S. 547 (1892).

mony was not subject to the same prohibition. Therefore, the protection afforded him was not coextensive with the privilege against self-incrimination. The government argued that the protection of the self-incrimination clause was fully afforded to the petitioner by the statute.[28] The Court held that the testimony could not be used in a subsequent criminal prosecution but agreed with the petitioner's contention with respect to the derivitive aspects. It found that the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court."[29] Therefore it held that the statute did not provide protection coextensive with the constitutional privilege.

After holding that the limited use immunity provided in the statute was constitutionally deficient, the Court attempted to define the elements of a constitutionally valid immunity statute. It said that no statute which compels incriminating information, yet leaves the witness liable to criminal prosecution for acts relating to that information can supplant the privilege against self-incrimination. "[A] statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."[30]

The Court's statement suggested that only transactional immunity afforded the protection necessary to supplant the privilege against self-incrimination. However, the statute in *Counselman* provided far less protection than that afforded by transactional immunity and less protection than use immunity, therefore, the Court's statement was not necessitated by the facts of the case and is *dicta*.

Despite the fact that much in *Counselman* was dicta, Congress nevertheless amended the Interstate Commerce Act to provide

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[28] The section is a reenactment of the Act of Feb. 25, 1868, ch. 13, 15 Stat. 37. Section 860 reads "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . ." Arguably the words "*in any manner used against him*" could be construed to apply to derivitive use. Such a construction would have avoided the constitutional issue. *See generally* Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis J. dissenting). There is no indication in the Court's opinion that this constructional argument was raised by either party.

[29] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892).

[30] *Id* at 142 U.S. 586.

transactional immunity.[31] Thus the groundwork was laid for the Court to answer the ultimate questions involving immunity: whether any statute was sufficient to overcome the right of silence guaranteed by the privilege against self-incrimination and whether transactional immunity provided sufficient protection? These questions were presented to the Supreme Court in *Brown v. Walker*.[32] The statute in *Brown* provided transactional immunity. It stated that no person may be prosecuted "for or on account of any transaction, matter or thing concerning which he may testify or produce evidence"[33] before the Interstate Commerce Commission. In determining whether the statute could supplant the privilege against self-incrimination, the Court recognized that the self-incrimination clause was susceptible of two interpretations. One was that no governmental agency could disturb the right. One federal district court had declared as much, with respect to the statute involved in *Brown*.[34] The other interpretation was that the clause did not prevent compelling a witness to testify, if his answers could not be used against him, either directly or indirectly, in a subsequent criminal trial. The Court held that a statute which protected a witness from prosecution for any acts related to his testimony was sufficient to supplant the privilege against self-incrimination. The purpose of the privilege against self-incrimination was achieved by the transactional immunity provided by Congress.[35]

The *Counselman* and *Brown* cases clearly establish that the United States may compel a citizen to supply it with information,

[31] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443; The amendment read: . . . But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence . . . before said Commission. . . . The Interstate Commerce Act, 49 U.S.C. § 43 (1964); Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 *as amended*. It is interesting to note that instead of providing the narrower protection of full use immunity—the lack of which provided the holding of the Court in *Counselman*—Congress provided the more encompassing protection of transactional immunity. Presumably Congress believed that the *dicta* and not the asserted reasoning for the holding was the constitutional standard.

[32] 161 U.S. 591 (1896).

[33] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443; *see* n. 31 *supra*.

[34] United States v. James, 60 F. 257 (N.D. Ill. 1894). Although the rule espoused in this case has never become controlling in the United States, the eloquence of the trial judge has not been obscured by the passing years. *See* Ullman v. United States, 350 U.S. 422, 449 (1956) (Douglas J. dissenting).

[35] The dissenting opinions of Justices Shiras and Field as well as the dissenting opinion of Justice Douglas in Ullman v. United States 350 U.S. 422 (1956) strongly question whether any immunity statute can offer adequate protection to an individual who seeks the protection of the privilege against self-incrimination.

if in return for the information, it protects the citizen as fully as does the privilege against self-incrimination. Protection against the use of the compelled testimony in a criminal trial without protection against the use of information derived from the compelled testimony is not sufficient to supplant the privilege. Transactional immunity which offers more protection than the combined elements of use immunity, provides sufficient protection to supplant the privilege against self-incrimination.

B. *PARDON AND EQUITABLE IMMUNITY*

By 1970 more than 50 federal statutes contained immunity provisions.[36] None of these statutes provided a general immunity provision applicable to all cases involving a violation of federal law.[37] Each statute was designed to operate within a specific area of the law or was applicable to only one agency or department of the government. Thus, there was an immunity statute dealing only with national security[38] and one dealing only with narcotics.[39] Similarly one statute applied only to proceedings before the Federal Power Commission[40] and another to proceedings before the Federal Communications Commission.[41] Such an *ad hoc* statutory scheme always presented the possibility that a governmental agency or grand jury might find itself unable to grant immunity because there was no statutory authorization to do so. When these situations arose, government officials invoked other procedures in an attempt to overcome a witness' reliance on the privilege against self-incrimination. One procedure was to offer the witness a presidential pardon[42] for all offenses that related to his testimony.[43]

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[36] A complete list of Federal Immunity Statutes prior to 1970 may be found in *Hearings on S.30, S.974, S.975, S.976, S.1623, S.1624, S.1861, S.2022, S.2122, and S.2292, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. at 319 (1969). *See also*, Shapiro v. United States, 335 U.S. 1, 6 n. 4 (1948).

[37] *See* discussion of Organized Crime Control Act of 1970, *infra* at § IV.

[38] 18 U.S.C. § 3486 (1964), Act of Aug. 20, 1954, ch. 769, 68 Stat. 745.

[39] 18 U.S.C. § 1406 (1964), Act of Jul. 18, 1956, ch. 68, § 201, 70 Stat. 574.

[40] 16 U.S.C. § 825(g) (1964); Federal Power Act, Act of June 10, 1920, as amended by, Act of Aug. 26, 1935, ch. 687, § 307(g) 49 Stat. 858.

[41] 47 U.S.C. § 409(1) (1964), Federal Communications Act, Act of June 19, 1934, ch. 652 § 409(e), 48 Stat. 1097.

[42] U.S. CONST. art. II states "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States. . . ."

[43] *See* Ex parte Garland 71 U.S. (4 Wall) 333, 380 (1867), where the Supreme Court held that pardons could be granted before or after legal proceedings were commenced.

This procedure was invoked in *Burdick v. United States.*[44] Burdick, a newspaper editor, invoked the privilege against self-incrimination and refused to answer the questions of a grand jury. He was then offered a pardon signed by President Wilson which applied to all offenses which he may have committed involving certain articles which appeared in his newspaper.[45] Burdick declined to accept the pardon and persisted in his refusal to answer. He was subsequently held in contempt for his refusal to answer and eventually sought review from the Supreme Court. He argued that a pardon must be accepted to be effective and in the absence of such acceptance, his testimony could be used against him in a criminal prosecution.

The government argued that a pardon was like a grant of immunity and was effective when tendered. They noted statutory grants of immunity are effective when granted and acceptance by the grantee is immaterial. The grant eliminates the right of the witness to invoke the privilege against self-incrimination and makes subsequent refusal to answer questions subject to criminal prosecution. Therefore, the government claimed, after the pardon was tendered, Burdick could no longer lawfully refuse to testify.

The Court agreed with Burdick, found that there were substantial differences between grants of immunity and pardons and held that to be effective a pardon must be tendered and accepted.[46] It said:

> This brings us to the differences between legislative immunity and a pardon. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law given protection against a sinister use

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[44] 236 U.S. 79 (1915).

[45] The Pardon read in part: . . . I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said George Burdick a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter, or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

[46] *See* United States v. Wilson 32 U.S. (7 Pet.) 150 (1833).

of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.[47]

Although acceptance of a pardon and the giving of testimony in return is tantamount to a confession of guilt, no criminal sanctions apply to the witness. Therefore it appears that the only real sanction is infamy or notoriety. Since the object of the privilege against self-incrimination is not protection against these consequences and since governments, through the use of immunity statutes, can compel answers which create these consequences,[48] the Court's reasoning in *Burdick* is not persuasive. However, if the Court is saying that infamy or notoriety should only be caused by officials acting pursuant to a valid statute and not by the act of one individual even if that individual is the President, the decision, while not wholly satisfactory, is at least more palatable.

Probably the most widely used substitute for a grant of immunity is a prosecutor's promise not to prosecute in return for information or important testimony in another case. Since the purposes of immunity grants are to facilitate the administration of justice[49] and to secure information[50] the promise not to prosecute fulfills the purposes of immunity statutes. As long as both parties fulfill their sides of the bargain the agreements are effective substitutes for grants of immunity. However, it must be emphasized that these are voluntary agreements. The offer and acceptance of a promise not to prosecute does not eliminate the right to invoke the privilege against self-incrimination. The right accruing to a witness who has testified pursuant to a prosecutor's agreement not to

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[47] Burdick v. United States, 236 U.S. 79, 94 (1915); *But see* Ex parte Garland 71 U.S. (4 Wall.) 333 (1867). In that case the Supreme Court considered the nature of a pardon in a different factual setting. There the President had given a pardon to an individual who had been a member of the Congress of the Confederacy. The issue was whether the Presidential pardon was sufficient to allow the petitioner to resume his practice as a member of the bar of the Supreme Court. The Court said: A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him as it were a new man, and gives him a new credit and capacity. 71 U.S. (4 Wall.) at 380–81.

[48] *See* Ullman v. United States, 350 U.S. 422 (1956); Smith v. United States, 337 U.S. 137 (1949).

[49] United States v. Monia, 317 U.S. 424, 437 (1943) (Frankfurter J. dissenting on other grounds).

[50] *See* United States v. Armour & Co., 142 F. 808 (N.D. Ill. 1906).

prosecute has been the subject of much litigation.[51] The Supreme Court has held that such an agreement is not an enforceable bar to prosecution. Even though the witness has fulfilled his part of the agreement,[52] he receives only an equitable right to a pardon. This right is often called equitable immunity.[53] He is also entitled to a continuance of his trial to enable him to apply to the executive for a pardon and he is entitled to the prosecutor's recommendation that he be given the pardon.[54]

Although pardons and equitable immunity can be useful law enforcement tools they suffer from the same weakness. Both rely on voluntary testimony, because the recipients of pardons or equitable immunity cannot be compelled under penalty of law to testify. Therefore they are unreliable substitutes for statutory grants of immunity.

C. *THE AUTHORITY TO GRANT IMMUNITY*

The authority of the various branches of government to grant immunity has not always been clear. At various times, personnel of each branch of government have attempted to give grants of immunity without statutory authority.

The authority of the judiciary to grant immunity absent statutory authorization was considered and rejected in *Issacs v. United States*.[55] The appellant invoked the privilege against self-incrimi-

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[51] United States v. Ford, 99 U.S. 594 (1879); Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969); Healey v. United States, 186 F.2d 164 (9th Cir. 1950); United States v. Levy, 153 F.2d 995 (3d Cir. 1946); Saunders v. Lowry, 58 F.2d 158 (5th Cir. 1932).

[52] United States v. Ford, 99 U.S. 594 (1879).

[53] Equitable immunity has its roots in the common law doctrine of approvement. At common law one who was indicted for a capital offense could confess his crime, and name his accomplices or accuse others of the crime. The accomplice, called a probator, would then have to stand trial either by battle or by jury. If the probator emerged as the conqueror or was acquitted, then the accuser (approver) would be found guilty upon his own confession and sentenced to death. *See* 4 W. BLACKSTONE, COMMENTARIES 329–30.

[54] *See generally*, United States v. Ford, 99 U.S. 594, 604 (1879). Subsequent cases have followed and applied the doctrine of equitable immunity. Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969); Huerta v. United States, 322 F.2d 1 (9th Cir. 1963); Healey v. United States 186 F.2d 164 (9th Cir. 1950). One writer has suggested that equitable immunity should be legally enforceable as a bar to trial. 8 J. WIGMORE, EVIDENCE § 2280 (McNaughton ed. 1961). On the other hand one federal court has declined to apply the doctrine where the individual seeking its protection was the principle offender. Gladstone v. United States, 248 F. 117 (9th Cir. 1918). Another court has cast doubt on whether the doctrine still exists or has ever existed in the United States. King v. United States, 203 F.2d 525 (8th Cir. 1953).

[55] 256 F.2d 654 (8th Cir. 1958).

nation and refused to testify before a federal grand jury. The United States Attorney asked a district court to direct the appellant to testify. The court issued the order and provided "as a condition to the said witness, Harry H. Issacs, conforming to the direction of the Court in the foregoing respect...the Court does hereby extend immunity to him in connection with any answer he may give to said questions or for any prosecution..."[56] The appellant persisted in his refusal to answer and was held in contempt. On appeal he claimed, *inter alia* that the trial court's order was invalid because the court was without statutory authority to grant immunity. The circuit court agreed stating "[t]he attempt to grant such an immunity was not within the judicial power but was an attempted exercise of legislative power."[57]

There appears to be no case in which the President has sought to give a grant of immunity. However, attempts by other members of the executive branch to grant immunity without statutory authorization have been uniformly thwarted by the courts.[58] There appears to be no reason why the logic of these decisions would not apply to all members of the executive branch, including the President.

The common thread running through all the cases concerning the authority to grant immunity is that effective grants of immunity may only be given if they are authorized by statute. Therefore only the legislative branch of government has the inherent authority to provide effective grants of immunity. This was clearly stated in *Earl v. United States*.[59] The district court denied a defense request that the court grant immunity to a defense witness. In affirming the decision of the lower court, Chief Justice (then Judge) Burger wrote:

> What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. This

[56] *Id.* at 657.

[57] *Id.* at 661; *see* Sorrells v. United States, 287 U.S. 435 (1932); Mattes v. United States, 79 F.2d 127 (3d Cir. 1935).

[58] Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969) (promise of narcotics agent that no indictment would be returned if defendant cooperated with government held unenforceable); Healey v. United States, 186 F.2d 164 (9th Cir. 1950) (promise of immunity by United States Attorney held insufficient to supplant the privilege against self-incrimination). *See*, The Whiskey Cases, 99 U.S. 594 (1879) and United States v. Levy, 153 F.2d 995 (3d Cir. 1946) where it was held that the promise of immunity by a U.S. attorney absent statutory authorization conferred only equitable immunity. *But cf.* United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969).

[59] 361 F.2d 531 (D.C. Cir. 1966); *see* Morrison v. United States, 365 F.2d 521 (5th Cir. 1966).

> power is not inherent in the Executive and surely is not inherent in the judiciary. In the context of criminal justice it is one of the highest forms of discretion conferred by Congress on the Executive, *i.e.* a decision to give formal and binding absolution in a judicial proceeding to insure that an individual's testimony will be compelled without subjecting him to criminal prosecution for what he may say .... We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power.[60]

D. *DUAL SOVEREIGNTY*

The nature of the federal system raises many questions with regard to grants of immunity. Can the recipient of a federal or state grant of immunity refuse to testify because he is still subject to prosecution by the other sovereign? Is the testimony of a witness, compelled to testify by one sovereign's grant of immunity, admissible in the other sovereign's criminal trial? Can the federal government bar state criminal proceedings against a witness compelled to testify in a federal proceeding?

The Supreme Court has, on many occasions, attempted to answer these questions.[61] The answers were conflicting, based in large part upon the misreading[62] and overlooking[63] of earlier cases. One line of cases held that a witness could successfully invoke the privilege against self-incrimination in one jurisdiction if his testimony could tend to incriminate him under the laws of another jurisdiction.[64] The other line of cases held that the privilege could only be invoked to protect the witness against the sover-

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[60] Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966).

[61] Knapp v. Schweitzer, 357 U.S. 371 (1958); Adams v. Maryland, 347 U.S. 179 (1954); Feldman v. United States, 322 U.S. 487 (1944); United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906); Ballmann v. Fagin, 200 U.S. 186 (1906); Jack v. Kansas, 199 U.S. 372 (1905); Brown v. Walker, 161 U.S. 593 (1896); United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828).

[62] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

[63] *Id.* In United States v. Murdock, 284 U.S. 141 (1931), the Court cited two English cases, Kingdom of the Two Sicilies v. Wilcox, 61 Eng. Rep. 116 (V. Ch. 1851) and Queen v. Boyes, 121 Eng. Rep. 730 (K.B. 1861) for the proposition that one may not invoke the privilege against self-incrimination merely because his disclosures would tend to incriminate him under the laws of another nation. The Court omitted any reference to United States v. McRae, L.R.3 Ch. 79 (1867) which distinguished Wilcox and held that the privilege against self-incrimination may be invoked to prevent incrimination under the law of another nation.

[64] Ballmann v. Fagin, 200 U.S. 186 (1906); United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828).

eign compelling the answers.[65] The law was so confused[66] that Mr. Justice Black was moved to write:

> [a] witness who is called before a state agency and ordered to testify [is placed] in a desperate position; he must either remain silent and risk state imprisonment for contempt or confess himself into a federal penitentiary.... Indeed things have now reached a point... where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self incrimination in the Constitution of each.[67]

In *Murphy v. Waterfront Commission*,[68] the Supreme Court attempted to resolve the immunity problems inherent in the dual sovereignty of the federal system. The Court framed its task as this: "we must now decide the fundamental constitutional question of whether, absent an immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction."[69] The petitioners had been granted immunity under the laws of New York and New Jersey. They refused to testify before the Waterfront Commission of New York Harbor because their testimony might tend to incriminate them under federal law. The Supreme Court examined the history and the policies of the privi-

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[65] Knapp v. Schweitzer, 357 U.S. 371 (1958); Feldman v. Maryland, 347 U.S. 179 (1954); United States v. Murdock, 284 U.S. 141 (1931); Jack v. Kansas, 199 U.S. 372 (1905). In Adams v. Maryland, 347 U.S. 179 (1954) and Brown v. Walker 161 U.S. 593 (1896) the Court held that under the Supremacy Clause, Congress could, by an immunity statute, prevent a state from criminally prosecuting an individual who had been granted federal transactional immunity.

[66] Nothing could better illustrate the hopeless morass in this area than the conflicting opinions of Justices Goldberg and Harlan in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

[67] Knapp v. Schweitzer, 357 U.S. 371, 384–85 (1958) (dissenting opinion). Knapp invoked the privilege against self-incrimination and refused to testify before a New York grand jury. After being granted transactional immunity under New York law he still refused to testify. In the Supreme Court he argued that the state grant of immunity would not protect him against federal prosecution, therefore he could not be compelled to testify. In an opinion which stated that state autonomy and authority would be hampered if the Court held for the petitioner, the Court rejected Knapp's claim and held that his predicament was "a price to be paid for our federalism." 357 U.S. at 381.

[68] 378 U.S. 52 (1964).

[69] *Id.* at 54.

lege against self-incrimination[70] and the conflicting case law[71] and concluded that *The Saline Bank Case*[72] and *Ballmann v. Fagin*[73] correctly stated the law. The Court held "that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[74]

After holding that a grant of immunity by one sovereign in the federal system is applicable to the other, the court had to determine whether transactional immunity or something less encompassing was constitutionally required. If one sovereign was compelled to grant transactional immunity in order to secure the testimony of a witness, the other sovereign would automatically be foreclosed from criminally prosecuting the witness. All federal immunity statutes enacted after *Counselman v. Hitchcock*[75] provided for transactional immunity. Thus, until *Murphy* the court had never been faced with this issue. The Court examined *Counselman* and found that the main concern of the earlier Court was not that transactional immunity had not been provided. Rather it was that information derived from the compelled testimony could be used against the witness in a subsequent criminal proceeding. The *Murphy* Court held:

> the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.[76]

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[70] The Court said: The privilege against self-incrimination reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" . . . and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." 378 U.S. at 55.

[71] *See* note 61, *supra*.

[72] 26 U.S. (1 Pet.) 100 (1828).

[73] 200 U.S. 186 (1906).

[74] Murphy v. Waterfront Comm'n, 378 U.S. 52, 77–78 (1964).

[75] 142 U.S. 547 (1892); see § IIA *supra*.

[76] Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964). *See* May v. United States, 175 F.2d 994, 1000 (D.C. Cir. 1949).

Thus it appeared that use immunity was adopted as the constitutionally required minimum for effective immunity statutes. This conclusion was apparently reaffirmed by the Court in *Gardner v. Broderick*.[77] There the Court stated that "Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."[78] However in both *Stevens v. Marks*[79] and *Piccirillo v. New York*,[80] the Supreme Court stated that *Murphy*[81] did not decide whether one sovereign may preclude invocation of the privilege against self-incrimination by a grant of use immunity and that the question was still open. Therefore the present state of the law seems to be that where a state grants transactional immunity or use immunity to a witness, the witness is still subject to federal prosecution for offenses about which he testifies but neither his testimony nor anything derived from it may be used against him in the federal prosecution. Similarly where the federal government grants use immunity to a witness, the witness is still subject to state prosecution but neither his testimony nor information derived from his testimony may be used against him in the state trial.[82] However, where only one sovereign is involved *i.e.*, where a state is investigating a purely state offense, or where the federal government is investigating a purely federal offense, it is not settled whether a grant of transactional immunity or of use immunity is the constitutionally required minimum for preventing the invocation of the privilege against self-incrimination.[83]

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[77] 392 U.S. 273 (1968).

[78] *Id.* at 276.

[79] 383 U.S. 234 (1966).

[80] 400 U.S. 548 (1971).

[81] 378 U.S. 52 (1964).

[82] Where the federal government gives transactional immunity to a witness, state prosecution may be foreclosed by operation of the supremacy clause of the constitution. U.S. CONST. art IV; *see* Adams v. Maryland, 347 U.S. 179 (1954); Brown v. Walker, 161 U.S. 593 (1896).

[83] Apparently the Supreme Court has decided to settle the issue. It has noted probable jurisdiction in Zicarelli v. Comm'r of Investigation, 55 N.J. 249, 261 A.2d 129 (1970), *prob. juris. noted*, 39 U.S.L.W. 3375 (Mar. 1, 1971). Pertinent questions noted by the Court are—

1. Whether a state immunity statute which merely prevents the subsequent use of a witness' testimony and evidence derived therefrom is sufficient to supplant the privilege against self-incrimination?

2. Whether Counselman v. Hitchcock, which stated that absolute immunity against further prosecution is required before the fifth amendment privilege may be supplanted, is still the law of the land?

3. Whether the immunity statute can supplant the fifth amendment privilege when it fails to provide immunity against foreign prosecution, with respect to an individual who has a real fear of such foreign prosecution?

It is submitted that a grant of use immunity is all that should be required of a sovereign before it can compel testimony.

> Where the People have a completely good case against a defendant without his testimony, there is not a single sound policy reason, nor is there a constitutional compulsion requiring that a grant of immunity gain a witness complete freedom from criminal liability for his wrongful acts simply because the acts were at some point mentioned [by the defendant] to a Grand Jury.[84]

Moreover "an immunity against *prosecution* would exceed what the Fifth Amendment protects, for the Fifth Amendment protects the witness only with respect to what the witness can furnish and not from evidence from other sources."[85]

> So long as the government is forced to seek independent evidence to prosecute the witness, he is no worse off for having testified under a grant of immunity than if his claim of privilege was unquestioned in the first instance. If, after a grant of immunity, some other jurisdiction decides to press charges against the witness, it will have the burden of proving that the new evidence it introduces has an independent source.[86]

III IMMUNITY IN THE MILITARY SYSTEM

A. *ROLE OF THE CONVENING AUTHORITY*

The privilege against self-incrimination is a fundamental right of military law. It has been a part of military law since before the Constitution was written[87] and is codified in Article 31[88] of the

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[84] People v. LaBello, 24 N.Y. 2d 598, 249 N.E. 2d 412, 414, 301 N.Y.S. 2d 544 (1969). To the extent that this case purports to interpret the New York immunity statute it has been overruled. Gold v. Menna, 25 N.Y. 2d 475, 255 N.E. 2d 235, 307 N.Y.S. 2d 33 (1969). However the latter case did not disturb or dispute the former's reasoning with respect to the value and constitutionality of use immunity.

[85] Zicarelli v. Comm'n of Investigation, 55 N.J. 249, 261 A.2d 129 (1970).

[86] United States *ex. rel.* Ciffo v. McClosky, 273 F. Supp. 604, 606 (S.D.N.Y. 1967). *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n. 18 (1964).

[87] American Articles of War, Art. 6 (1786) printed in WINTHROP, MILITARY LAW AND PRECEDENTS, 972 (2d ed. 1920).

[88] Compulsory self-incrimination prohibited.

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Uniform Code of Military Justice. The scope of the military privilege has been extensively developed in the decisions of the Court of Military Appeals[89] and in the *Manual for Courts-Martial*.[90] The protection afforded by the military privilege is "wider in scope"[91] than that afforded by the constitutional privilege.

The law relating to military grants of immunity is neither well defined nor well developed. There is no immunity provision in the Uniform Code of Military Justice and no Federal immunity statute has been applied to the military.[92] The military law of immunity has its foundation in the *Manual for Courts-Martial*. The 1917 Manual[93] stated "the fact that an accomplice turns state's evidence does not make him immune from trial, unless immunity has been promised him by the authority competent to order his trial."[94] The 1921 Manual[95] contained the same sentence and the 1928 Manual[96] specified that only a general court-martial convening authority could grant immunity.[97] Subsequent Manuals[98] contained the same provision. The present Manual[99] states:

> An authority competent to order a person's trial by general court-martial may grant or promise him immunity from trial. A grant of immunity may be interposed as a bar to trial if the trial in question

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(c) No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial. 10 U.S.C. § 831 (1964).

[89] United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[90] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION). The Manual is promulgated pursuant to Article 36 of the Uniform Code of Military Justice.

[91] United States v. Musguire, 9 U.S.C.M.A. 67, 68, 25 C.M.R. 329, 330 (1958); *See* United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).

[92] *See* discussion of the Organized Crime Control Act of 1970 *infra* at § IV.

[93] Manual for Courts-Martial, U.S. Army, 1917.

[94] *Id.* at para. 216.

[95] Manual for Courts-Martial, U.S. Army, 1921, para. 216.

[96] Manual for Courts-Martial, U.S. Army, 1928.

[97] *Id.* at para. 120*d*.

[98] Manual for Courts-Martial, United States, 1969, para. 148*e*; Manual for Courts-Martial, United States, 1951, para. 148*e*.

[99] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION).

> is contrary to the grant. A promise of immunity may also be interposed as a bar to trial if the trial is contrary to the promise.[100]

Once the general court-martial convening authority[101] gives a grant of immunity he is disqualified from taking action[102] on the record of trial.[103] The Court of Military Appeals has said that the grant of immunity involves the convening authority:

> . . .in the prosecution of the case to an extent where there is at least some doubt of his ability to impartially perform his statutory duty. He must weigh the evidence, pass on the credibility of witnesses and satisfy himself from the evidence that the accused is guilty beyond a reasonable doubt. It is asking too much of him to determine the weight to be given this witness' testimony since he granted the witness immunity in order to obtain his testimony. This action

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[100] *Id.* at para. 68*h*. Although this paragraph appears to recognize two types of immunity the analysis of the Manual's contents is silent about the distinction if any. U.S. DEP'T OF ARMY, PAMPHLET NO. 27–2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, 1969, REVISED EDITION para. 68*h* (1970). The analysis cites United States v. Guttenplan, 29 C.M.R. 764 (A.F.B.R. 1955) where the Board held that military immunity was twofold, statutory (transactional) and contractual (less encompassing than transactional). It appears that this confusing and unknowledgeable opinion may have served as the basis for the dichotomy in the present Manual. Because *Guttenplan* shows a vast misconception of the law of immunity the apparent dichotomy in the present Manual has been disregarded in this article.

[101] Despite the provisions of the Manual, commanders other than general court-martial convening authorities have attempted to grant immunity to members of their command. In *United States v. Thompson* the accused was charged with the larceny of a quantity of wire. His squadron commander told him that he would not be prosecuted if he revealed information about other non-related offenses. The accused accepted the offer, divulged the information and was subsequently court-martialed for the theft of the wire.

At the trial the defense moved to dismiss the charges because of the promise not to prosecute. The defense conceded that the squadron commander did not have the authority to grant immunity. Nevertheless they claimed that the accused had been given a "defective grant of immunity" because the squadron commander represented himself as having the authority to make and enforce a promise of immunity. The Court of Military Appeals affirmed the trial court's denial of the motion. The court stated that only a general court-martial convening authority could give an effective grant of immunity. Since the squadron commander was not one, his promise was unenforceable, unless he was acting as an agent for, or the promise was ratified by, a general court-martial convening authority. 11 U.S.C.M.A. 252, 29 C.M.R. 68 (1960). The promise of a reward by the victim of a crime, does not grant immunity to the perpetrator. Similarly, the promise of a benefit, by a criminal investigator, which would render a subsequent admission, inadmissable, is not a bar to trial. United States v. Van Keuren, 16 C.M.R. 434 (N.B.R. 1954).

[102] *See* UNIFORM CODE OF MILITARY JUSTICE, arts. 60, 64.

[103] United States v. Gilliland, 10 U.S.C.M.A. 343, 27 C.M.R. 417 (1959); United States v. Moffet, 10 U.S.C.M.A. 169, 27 C.M.R. 243 (1959); United States v. White, 10 U.S.C.M.A. 63, 27 C.M.R. 137 (1958).

> precludes his being the impartial judge he must be to properly perform his judicial functions.[104]

Although the authority to take the action on the record of trial is inherent in the office and not in the individual, the disqualification is personal, not official. Therefore a successor in office may take action on the record of trial because he is not required to review his own previous conduct in the case.[105]

The convening authority who grants immunity is not disqualified, absent a showing of prejudice to the accused, from referring the case to trial.[106] The Court of Military Appeals has said that in referring a case to trial, the convening authority acts like a grand jury and need only find probable cause to believe that the accused has committed the offense.[107] When taking post-trial action on the record, he must be convinced of guilt beyond a reasonable doubt before he can approve a finding of guilty.[108] Therefore "[i]n the role of passing upon his own previous grant of immunity, he might well be inclined to give undue weight to the testimony of the witness involved."[109] The court's reasoning is open to question. Whether the standard be probable cause or reasonable doubt, the convening authority must judge the weight of the evidence and the credibility of those who offer it. Thus, in deciding reference and post-trial action, the convening authority must determine the weight of the evidence offered by the recipient of the immunity. Therefore consistency requires that once a convening authority grants immunity he should, with the exception of ministerial acts, either be disqualified from all further participation in the case or be able to make the referral and take the action notwithstanding the grant of immunity.

The disqualification rule has, with but two exceptions[110] been rigidly enforced. In one case,[111] to prevent a delay in the trial of an accomplice, a witness was granted immunity three days after

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[104] United States v. White, 10 U.S.C.M.A. 63, 27 C.M.R. 137, 138 (1958); *see also* United States v. Marsh, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953).

[105] United States v. Gilliland, 10 U.S.C.M.A. 343, 27 C.M.R. 417 (1959).

[106] United States v. Moffet, 10 U.S.C.M.A. 169, 27 C.M.R. 243 (1959); United States v. Stuckey, 32 C.M.R. 958 (A.F.B.R. 1963); *see* Green v. Convening Authority, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970).

[107] United States v. Moffet, 10 U.S.C.M.A. 169, 27 C.M.R. 243, 244 (1959).

[108] UNIFORM CODE OF MILITARY JUSTICE, art. 64.

[109] United States v. Moffet, 10 U.S.C.M.A. 169, 27 C.M.R. 243, 244 (1959).

[110] United States v. Frye, 39 C.M.R. 448 (A.B.R.), *petition denied*, 18 U.S.C.M.A. 615, 39 C.M.R. 293 (1968); United States v. Wilson—C.M.R.—(A.C.M.R. Feb 11, 1971)

[111] United States v. Torres, 27 C.M.R. 676 (A.B.R. 1959).

his conviction by general court-martial.[112] The Board of Review recognized that the grant was given solely to remove "a technically well grounded claim of privilege"[113] and that the convening authority was neither emotionally nor intellectually involved in the prosecution of the case. Nevertheless it felt "constrained to hold that despite factual distinctions between [the *White* and *Moffet* cases] any grant of immunity to a prosecution witness disqualifies the convening authority from reviewing the record of trial. . . "[114] In another case it was held that where a deputy commanding general, who had assumed command in the absence of the commanding general, granted immunity to a witness, the commanding general was disqualified from taking the action in the case.[115] However, where the convening authority grants immunity to a defense witness in order to insure that all possible evidence is available to the court-martial, or where he grants immunity to a witness and the accused subsequently pleads guilty, he is not disqualified from acting on the record of trial.[116]

A staff judge advocate may likewise be disqualified from writing the post-trial review in a case in which immunity is granted. Where he seeks out witnesses and negotiates grants of immunity with them or makes promises of immunity to potential witnesses he becomes in effect a member of the prosecution and ineligible to write the post-trial review.[117]

B. *CONDITIONS OF THE GRANT*

The Manual does not prescribe the procedure for granting immunity. Normally the staff judge advocate or the trial counsel

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[112] *See also* Frank v. United States, 347 F.2d 486 (D.C. Cir. 1965) where the appellant was granted immunity after his conviction, while he was pending appeal. The court held that the grant of immunity mooted his appeal and set aside the conviction. In *Torres* the grant of immunity by its terms applied only in the event there was a rehearing.

[113] The privilege against self-incrimination may be invoked until a conviction is final. Convictions by General Court-Martial are not final until the review of the case is fully completed. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION) para. 75*b* . *See* UNIFORM CODE OF MILITARY JUSTICE, arts. 65–67, 69.

[114] United States v. Torres, 27 C.M.R. 676, 678 (A.B.R. 1959).

[115] United States v. Maxfield, ___ U.S.C.M.A. ____, ___ C.M.R. ___ (Apr. 16, 1971).

[116] United States v. Frye, 39 C.M.R. 448 (A.B.R.), *petition denied;* 18 U.S.C.M.A. 615, 39 C.M.R. 293 (1968) (grant of immunity to defense witness); United States v. Wilson, ___ C.M.R. ____ (A.C.M.R. Feb. 11, 1971) (plea of guilty subsequent to grant of immunity).

[117] United States v. Cash, 12 U.S.C.M.A. 708, 31 C.M.R. 294 (1962); United States v. Albright, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).

recommends that the convening authority grant immunity to a witness. However, it is proper for an accused to request a grant of transactional immunity for some offenses as part of an offer to plead guilty to other offenses.[118] The grant is normally in the form of a letter to the witness, informing him that he has been granted immunity and that he must testify in a particular case. The scope of the immunity is determined by the language of the letter.[119] It may purport to grant either transactional[120] or use immunity.[121] Since immunity is often given to accomplices, the grant may be limited to acts done in conjunction with co-accomplices.[122]

When the grant becomes too detailed and attempts to dictate the testimony of the witness, the witness may be declared incompetent. In *United States v. Stoltz*[123] a grant of transactional immunity was given on the condition that the witness testify *"and that such testimony include the following matters hereinafter set forth which are extracted from your written statement taken . . ."*[124] prior to trial. The grant then specified the expected testimony. The Court of Military Appeals condemned the conditioning of the grant in this manner and said:

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118 *See* United States v. Conway, 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970).

119 *Cf.* United States v. Guttenplan, 20 C.M.R. 764 (A.F.B.R. 1955).

120 United States v. Kirsch, 15 U.S.C.M.A. 84, 35 C.M.R. 56, 60 (1964). The grant of immunity is set out in full in the opinion of the Board of Review. United States v. Kirsch, 34 C.M.R. 553, 557 (A.B.R. 1964).

121 The Analysis of the Manual for Courts-Martial states that a military grant of immunity is valid only if it purports to give transactional immunity. This statement is based on the belief that the sanctioning of use immunity in Murphy v. Waterfront Comm'n applies only to cases involving two sovereigns and that "it still remains the law that for a grant of immunity to be effective as to offenses within the jurisdiction of the forum, the grant must protect its recipient from being tried at all for any such offense as to which his testimony might tend to incriminate him." U.S. DEP'T OF ARMY, PAMPHLET NO. 27–2, ANALYSIS OF CONTENTS, MANUAL FOR COURTS-MARTIAL, 1969, REVISED EDITION, para. 150*b* (1970). However if the Organized Crime Control Act of 1970, Pub. L. No. 91–452, (Oct. 15, 1970) is applicable to the military (*see* § IV *infra*) a general court-martial convening authority can only grant use immunity. Moreover it appears that the requirement of the Analysis that only transactional immunity be granted is not based on policy considerations but rather on an interpretation of what the law is today. Since the constitutionality of use immunity is not settled it appears that a general court-martial convening authority is not prohibited from giving a grant of use immunity. *See* Army TJAG Message JAGJ 1970/8737, subject: Grants of Immunity, 11 Dec. 1970, which limits the power of Army authorities to give grants of immunity.

122 United States v. Layne, 21 C.M.R. 384, 387 (A.B.R. 1956). The grant of immunity also stated that it was conditioned upon the witness testifying . . . *"for the prosecution"*. The emphasized words could be interpreted as dictating the nature of the testimony. As such it is improper and should be avoided.

123 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964).

124 *Id.* at 462, 34 C.M.R. 242 (emphasis supplied).

. . . we believe [this condition] contravenes public policy and renders . . . [the witness] incompetent to testify so long as he labors under its burden, for, regardless of the truth of the matters concerning which he had knowledge, he was bound to reiterate his pretrial declarations in order to obtain the reward which had been tendered him. In short, the grant was conditioned upon the witness giving testimony in a particular way.[125]

In *United States v. Conway*[126] a witness offered to plead guilty and testify against Conway if the charges then pending against the witness were referred to a special rather than a general court-martial. The staff judge advocate agreed to recommend acceptance of the offer if he were furnished a statement of expected testimony. He was not satisfied with a unsworn statement that was furnished and arranged to have an sworn statement taken in his office by the trial counsel. The latter statement was satisfactory to him and the convening authority accepted the offer. At the trial the witness indicated he thought he was required to conform his testimony to the statement given the staff judge advocate. Nevertheless the law officer distinguished *Stoltz* and refused to declare the witness incompetent. The Court of Military Appeals reversed and indicated that the testimony, was "subject to the same infirmities discussed"[127] in *Stoltz*. The court said, "Since the statement was the *sine qua non* for the staff judge advocate's recommendation that the general accept the offer made by . . .[the witness'] attorney, his [witness] belief that he must testify to the same effect at Conway's trial follows logically."[128] Thus not only must the grant of immunity be free from a condition requiring a witness to testify in a particular way; but the members of the prosecution must not indicate to the witness that he testify in a particular way.[129]

The court's decision is justified. When a reward, such as a grant of immunity, is offered in exchange for testimony, the possibility that the witness will tailor his testimony to favor the litigant

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[125] *Id.* at 464, 34 C.M.R. 244.

[126] 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970).

[127] *Id.* at 101, 42 C.M.R. 293.

[128] *Id.* at 101, 42 C.M.R. 293.

[129] Many witnesses, testifying under a grant of immunity do so reluctantly because they do not want to help secure the conviction of a friend or coworker in crime. Often these witnesses will perjure themselves or conveniently forget that part of their expected testimony which will most aid the prosecution. To provide for these possibilities and to provide material for refreshing memory and for impeachment the trial counsel should consider taking a signed, written statement from the witness prior to trial. If he does, he must be especially careful to refrain from indicating to the witness that the witness must testify according to the pretrial statement. If such an indication is given, it is likely that the witness will be declared incompetent.

offering the reward is substantial. When testimony favorable to the government is demanded as the *quid pro quo* for the reward, the probability of perjured testimony, damaging to the accused, is overwhelming. An enlightened system of justice can not and should not tolerate the inherent unfairness of such a situation.[130]

Under the former *ad hoc* federal immunity scheme the terms of the statute governed the time that the grant of immunity became effective.[131] Under some statutes, immunity did not attach, unless and until, the witness sought to invoke the privilege against self-incrimination.[132] Under other statutes, immunity attached as soon as a witness, appearing under the compulsion of a subpoena, began to testify.[133] The time that military grants of immunity become effective is not settled. However, since the scope of military immunity depends on the specific wording of the grant, it may be assumed that the date the immunity becomes effective is also governed by the wording of the grant.[134] Thus a grant conditioned on the act of testifying would become effective only when the witness testifies. Similarly a grant conditioned on the invocation of the privilege against self-incrimination would not be effective unless the witness claimed the privilege and refused to testify.

C. *THE KIRSCH CASE*

As noted earlier, a grant of immunity is legally effective only if given pursuant to a statute.[135] There is no statute governing military grants of immunity. Thus one asks if military grants of immunity are legally effective and whether a grantee may be prosecuted for willfully refusing to testify. The Court of Military Appeals faced these questions in *United States v. Kirsch*.[136] Kirsch was granted transactional immunity by a general court-martial convening authority and called as a witness in the trial of a co-

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[130] *Cf.* United States v. Scoles, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963). In *Scoles*, a case the court called "a shocking example of how a general court-martial should *not* be tried" (33 C.M.R. 227), the convening authority agreed to reduce the sentence of an accomplice by a year for each time he testified against his co-accomplices. The Court said "[w]e believe such a contingency agreement to be contrary to public policy. It offers an almost irresistible temptation to a confessedly guilty party to testify falsely in order to escape the consequences of his own misconduct." 33 C.M.R. at 232.

[131] United States v. Monia, 317 U.S. 424 (1943).

[132] 29 U.S.C. § 161 (1964) Act of Jul. 5, 1932, ch. 372, 49 Stat. 456; 49 U.S.C. § 1484(i), Act of Aug. 23, 1958, 72 Stat. 793.

[133] 15 U.S.C. § 49 (1964), Act of Sep. 26, 1914, ch. 311, 38 Stat. 723.

[134] *See* United States v. Layne, 21 C.M.R. 384 (1956).

[135] *See* § IIC *supra*.

[136] 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964).

conspirator. He invoked the privilege against self-incrimination and refused to testify. After being counseled by the law officer he persisted in his refusal. He was subsequently charged with willful refusal to testify and was convicted upon his plea of guilty. Before the Court of Military Appeals the accused claimed that only a grant of immunity provided by a statute could supplant the privilege against self-incrimination. Since the convening authority's grant was neither authorized by, nor made pursuant to, a statute, the grant was ineffective and could not abridge the right to remain silent.

The court rejected the accused's contentions, affirmed the conviction, and held that military grants of immunity are authorized by statute. It examined the power of the convening authority to discontinue investigations; to dismiss charges before trial; to withdraw charges from courts-martial and to disapprove any finding of guilty. It equated this power to the authority to grant pardons and found that the convening authority had the authority "to create an absolute legal bar to prosecution of a person subject to the"[137] Uniform Code of Military Justice. Since a grant of transactional immunity is one type of absolute legal bar to prosecution, the court held that Congress had given convening authorities the authority to grant transactional immunity. The court rejected the argument that under the Code a convening authority could not, prior to trial, create an absolute bar to conviction. It said:

> Must immunity for a prospective witness be conditioned upon whether a particular point is reached in the court-martial process? We can infer no such limitation from the manner in which the power to grant immunity was spelled out by Congress in the Uniform Code.[138]

The court stated that the Manual[139] did not purport to give convening authorities the power to grant immunity. Rather it merely prescribed a method by which grants of immunity could be given.[140]

To further support its finding that military immunity is statutory, the court stated that previous Manuals[141] provided for grants

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[137] *Id.* at 92, 35 C.M.R. 64.

[138] *Id.* at 93, 35 C.M.R. 65.

[139] Manual for Courts-Martial, United States, 1951, para. 148.

[140] The authority to do so is contained in UNIFORM CODE OF MILITARY JUSTICE, art. 36. *See* note 90 *supra.*

[141] Manual for Courts-Martial, U.S. Army, 1917, para. 216; Manual for Courts-Martial, U.S. Army, 1921, para. 216; Manual for Courts-Martial, U.S. Army, 1928, para. 120*d*; Manual for Courts-Martial, U.S. Army, 1949, para. 134*d*.

of immunity and no one questioned the authority to give such grants when the Code was considered by Congress. Therefore, the court found that this long continued legislative acquiescence was an indication that Congress authorized military grants of immunity.

Judge Ferguson dissented. He found no statute which conferred upon convening authorities, the power to grant immunity. Moreover he found no reason to believe that Congress intended that convening authorities should have the power to grant immunity.

It is submitted that Judge Ferguson has the more compelling argument. Try as one may, one cannot find a statute giving convening authorities the power to grant immunity. There is no such statutory authorization. Equating the convening authority's power to that of the power to grant pardons means little. The President also has the authority to grant pardons. However, as the *Burdick*[142] case clearly points out, the President cannot compel a person to accept a pardon. Therefore since the President cannot give grants of immunity based on his power to pardon, there is no reason to believe that a convening authority can do so.[143]

The court's argument that because the convening authority can exercise his power during and after a trial, he can also exercise it before trial is also tenuous. The history of federal immunity statutes shows that Congress has been very hesitant to give broad grants of authority.[144] Moreover the fact that Congress provided that convening authorities could create legal bars to prosecution *only* during and after courts-martial indicates that Congress did not intend that convening authorities could do so before trial.

The court left several questions unanswered in *Kirsch*. These questions—whether a military grant of transactional immunity would be effective in a state court, whether a military grant of immunity can be given to a civilian not subject to the Uniform Code of Military Justice and whether military grants of transactional immunity can be given for offenses cognizable both under

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142 Burdick v. United States, 236 U.S. 79 (1915); *see* § IIB *supra*.

143 When a convening authority gives a grant of immunity and the grantee is not prosecuted after he testifies no question arises as to the power to grant immunity. Throughout this article, the only individuals considered to have the authority to grant immunity are those who can employ the criminal law to punish grantees who refuse to testify. In this sense, the President of the United States cannot grant immunity.

144 The *ad hoc* nature of federal immunity statutes are an example of this. *See generally* the minority views of Congressman William Ryan in H.R. REP. NO. 91–1188, 91st Cong., 2d Sess. 39 (1970).

the Code and in the federal courts, raise more doubts as to the statutory nature of military immunity.

If military immunity is statutory, it would be binding on the states only to the extent prescribed by *Murphy v. Waterfront Commission.*[145] Thus a military grant of transactional immunity would not preclude a state prosecution for an offense covered by the grant of immunity. The grant would affect the state only to the extent that the witness' testimony and any information derived from that testimony could not be used against him in the state trial.

With respect to a federal prosecution, the issue is less clear. In *Kirsch*, the defense claimed that the grant of immunity was ineffective because it would not protect the accused from a prosecution in federal court. The court did not answer that the grant would fully immunize the accused nor did it resort to a *Murphy* type exclusionary rule. Instead the court considered the possibility of future federal prosecution in two ways. It found that there was a possibility that the accused had committed a capital offense in violation of 18 U.S.C. 794. This offense was not triable by court-martial.[146] The court concluded that "[i]f the offense is not cognizable by a court-martial, manifestly a general court-martial authority cannot grant immunity from prosecution therefore."[147] Nor was any other offense cognizable in both federal and military court found in the facts of the case. Had there been such an offense the court possibly would have approved the refusal to testify. There appears to have been no reason for the court to analyze the facts unless it believed that the existence of the possibility of a federal prosecution was sufficient to sustain the claim of privilege. Since a general court-martial convening authority cannot grant immunity for an offense not cognizable by a court-martial it should follow that he cannot grant immunity to a civilian witness who is not subject to military jurisdiction.[148]

The interpretation of *Kirsch* leaves the following limited scope of military grants of immunity. They may be denominated as

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[145] 378 U.S. 52 (1964); *see* § IID *supra.*

[146] UNIFORM CODE OF MILITARY JUSTICE, art. 134. The article reads in part; "Though not specifically mentioned in this code . . . crimes and offenses *not capital*, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, . . . and punished at the discretion of such court." (emphasis added)

[147] United States v. Kirsch, 15 U.S.M.C. 84, 96, 35 C.M.R. 56, 68 (1965).

[148] UNIFORM CODE OF MILITARY JUSTICE, art. 3(10); see United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970); *see generally* Washington Post, Dec. 4, 1970, at 1, col. 2, which discusses the problems involved in granting military immunity to civilian witnesses.

statutory but cannot be given to persons not subject to the Code. Military transactional immunity is not binding on the states. Transactional immunity cannot be given to those servicemen who have committed offenses cognizable solely by the federal courts, or cognizable by the federal courts *and* courts-martial. Therefore grants of transactional immunity are only effective in courts-martial for offenses cognizable only by courts-martial.[149]

A statutory immunity scheme such as this makes little sense. It is not rational for Congress to create an immunity procedure and then to so severely limit it as to render it largely ineffective. The foregoing analysis reemphasizes the conclusion—military immunity is not statutory immunity. Rather it appears to be an administrative procedure created by those who authored the various Manuals for Courts-Martial. It is akin to equitable immunity and appears to have been created to apply only to courts-martial. If a witness testifies pursuant to a grant of transactional immunity, the military courts are bound by the agreement. If the witness still refuses to testify after receiving the grant, he is in a position similar to an accused who does not fulfill his part of a pre-trial agreement and he may be prosecuted for any offenses he may have committed. Since the right to claim the privilege against self-incrimination can be supplanted only by a statutory grant of immunity, the refusal to testify pursuant to a grant of immunity not authorized by statute is proper.

The *Kirsch* case placed the court on the horns of a dilemma. It could declare that a time tested, effective law-enforcement procedure was unenforceable because criminal sanctions could not be employed against grantees who refused to testify. On the other hand, it could enforce the procedure by a strained interpretation of the Uniform Code of Military Justice. The court chose the latter course. Unfortunately, the strained reasoning necessary to achieve the result neither enhances the administration of military justice nor does credit to the court itself.[150]

IV. THE ORGANIZED CRIME CONTROL ACT OF 1970

Title II of the Organized Crime Control Act of 1970 [151] repealed

[149] If military immunity is not statutory, neither a grant of transactional nor use immunity would be effective in civilian courts. Since the court in *Kirsch* claimed that military transactional immunity was authorized by statute, the analysis in this section is limited to transactional immunity.

[150] *See* Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970) where the court took the pragmatic rather than a purely legal approach and limited the retroactivity of O'Callahan v. Parker, 395 U.S. 258 (1969).

[151] 18 U.S.C. § 6001–05 (Supp. 1970).

the more than 50 existing federal immunity statutes.[152] In their place was substituted one general immunity statute covering all cases involving the violation of a federal statute.[153] The immunity provisions of the Act apply "in a proceeding before or ancillary to —(1) a court or grand jury of the United States, (2) an agency of the United States," (3) either House of Congress or committee thereof.[154]

Section 6003 of the Act provides that whenever a witness before a court or grand jury invokes the privilege against self-incrimination and refuses to testify, the local United States Attorney, with the approval of the Attorney General of the United States, may apply to the local Federal District Court for an order requiring the witness to testify.[155] Before requesting the order the U.S. Attorney must believe that the testimony or other information sought from the witness "may be necessary to the public interest."[156] The order, when delivered, grants use immunity to the witness.[157]

Section 6004 provides that an agency of the United States may, with the approval of the Attorney General, order a witness to testify when the witness invokes the privilege against self-incrimination. The order which also grants use immunity may only be given when "the testimony or other information from such individual may be necessary to the public interest."[158]

The Act includes the military departments within the definition

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[152] 18 U.S.C. § 6005(b), Pub. L. No. 91–452 (Oct. 15, 1970).

[153] *See* Message of President Richard M. Nixon to the Congress of the United States, Apr. 23, 1969, quoted in H.R. REP. NO. 91–1188, 91st Cong. 2d Sess. 8 (1970).

[154] 18 U.S.C. § 6002, Pub. L. No. 91–452 (Oct. 15, 1970).

[155] 18 U.S.C. § 6003, Pub. L. No. 91–452 (Oct. 15, 1970).

[156] 18 U.S.C. § 6003, Pub. L. No. 91–452 (Oct. 15, 1970). The section also provides that the order may be requested before the witness is called to testify if in the opinion of the United States Attorney, the witness "is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

[157] 18 U.S.C. § 6002, Pub. L. No. 91–452 (Oct. 15, 1970). At least two federal courts have considered the constitutionality of the use immunity provision of the statute and have reached contrary results. In Stewart v. United States, 39 U.S.L.W. 2562 (9th Cir. 29 Mar. 1971), the court held that use immunity is constitutional and upheld the statute. In In re Kinoy Testimony, 39 U.S.L.W. 2427 (S.D.N.Y. 29 Jan. 1971), the court declared that only transactional immunity could supplant the privilege against self-incrimination and held the statute unconstitutional.

[158] 18 U.S.C. § 6005, Pub. L. No. 91–452 (Oct. 15, 1970). This section also provides that the order may be issued before the witness testifies if in the judgment of the agency, the witness is "likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

of "an agency of the United States"[159] and includes the Court of Military Appeals within the definition of a "court of the United States."[160] The Congressional reports specifically state that the military departments are within the definition of an *agency*[161] and that the Act "defines court of the United States *in all embracing terms.*"[162] This language and the absence of any provision exempting the military justice system from the provisions of the Act raises several questions: Does the Act apply to the military justice system? If it is applicable, is it the sole source of immunity provided by the United States or can it be used to supplement the existing military immunity procedure?

While the above references may support a claim that the Act applies to the military, there is evidence to support a contrary conclusion. The Act was originally proposed to aid in the fight against organized crime—a distinctly non-military matter.[163] The original immunity provision was intended to apply only to organized crime.[164] However, during the Senate hearings it was proposed that the existing federal immunity laws "be replaced by a single set of provisions which will bring uniformity to the operation of immunity grants within the entire Federal system."[165] The proposal was adopted by the Senate and was eventually enacted into law. Neither the proponent of this provision, Congressman Richard Poff of Virginia, nor any other advocate, mentioned the possible application to the military. Many independent agencies were asked to comment on the application of the new proposal to them. The agencies' responses were included in the report of the Senate hearings.[166] No response of the Defense Department or any of the military departments is included in the report. Nor is there

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[159] 18 U.S.C. § 6001, Pub. L. No. 91–452 (Oct. 15, 1970).

[160] 18 U.S.C. § 6001, Pub. L. No. 91–452 (Oct. 15, 1970).

[161] H.R. REP. NO. 91–1549, 91st Cong., 2d Sess. 42 (1970); H.R. REP. NO. 91–1188, 91st Cong., 2d Sess. 12 (1970); S. REP. NO. 91–617, 91st Cong., 1st Sess. 144 (1969).

[162] H.R. REP. NO. 91–1549, 91st Cong., 2d Sess. 42 (1970); H.R. REP. NO. 91–1188, 91st Cong., 2d Sess. 12 (1970); S. REP. NO. 91–617, 91st Cong., 1st Sess. 145 (1969) (emphasis added).

[163] While every citizen is concerned with organized crime and law enforcement, the Army and Air Force are prohibited from executing the law. The Posse Comitatus Act, 18 U.S.C. § 1385 (1964).

[164] *Hearings on S.30, S.974, S.975, S.976, S.1623, S.1624, S.1861, S.2022, S.2122, S.2292, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 282 (1969)* [hereinafter cited as *1969 Hearings*].

[165] *1969 Hearings*, 282.

[166] *1969 Hearings*, 515–29.

any indication that these departments were asked to comment.[167] The legislative history reveals only one reference to a court-martial. The House Report mentions that courts-martial convictions may be used to determine dangerous special offenders,[168] an important matter but one wholly unrelated to immunity.[169] The agency section of the Act applies throughout the world while the court section applies only to those areas in which there is a United States District Court.[170] Thus unless one is prepared to argue that courts-martial are more closely related to administrative hearings than to criminal trials, the Act does not apply to those military personnel stationed beyond the territorial jurisdiction of the federal courts.

Finally Title III of the Act provides that when a witness refuses to testify after being ordered to do so in accordance with Title II, the court can summarily order that he be confined until he is willing to testify.[171] Thus, if the Act applied to the military, a court-martial would be empowered to confine a civilian, not otherwise subject to the jurisdiction of a court-martial.

Notwithstanding the references to the military in both the Act and its legislative history, a reading of that history leads to the

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[167] *See generally* JAGJ 1971/7508 which states in pertinent part, "The Departments of the Army, Navy and Air Force were not consulted on this Act during the legislative process, and none of these Departments had an opportunity to comment on the bill prior to enactment."

[168] H. REP. NO. 91–1549, 91st Cong., 2d Sess. 61 (1970).

[169] Title X of the Act, 18 U.S.C. § 3575, Pub. L. No. 91–452 (Oct. 15, 1970) provides for increased sentences for multiple offenders.

[170] 18 U.S.C. §§ 6003, 6004, Pub. L. No. 91–452 (Oct. 15, 1970).

[171] 18 U.S.C. § 1826, Pub. L. No. 91–452 (Oct. 15, 1970). Section 1826 reads as follows:

"§ 1826. Recalcitrant witnesses

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

conclusion that the Act was not intended to apply to the military.[172] It is difficult to believe that the legislative history would be so devoid of references to the military justice system if Congress had intended the Act to apply to the system. If application had been intended, at the very least there should be some reference to the Defense Department's position. Moreover the inapplicability overseas means that a uniform procedure "covering all cases involving violations of Federal Statutes" is not created by the Act. Finally it is inconceivable that Congress, given the antimilitary feeling among a substantial portion of the population of the United States today, would empower a court-martial to confine, even with just cause, a civilian, not subject to the Uniform Code of Military Justice.[173]

Despite the strong argument to the contrary, it is not inconceivable that a federal or military court would declare that the Act is applicable to the military. The words "all embracing terms," the inclusion of the Court of Military Appeals in the definition of "a court of the United States" and the inclusion of the military departments in the agency section provide a large handle for a court

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[172] The role of the Attorney General is very important in the new immunity scheme. Immunity may not be granted to a court, grand jury or agency witness without his approval. Moreover he must be notified in advance before a witness in a Congressional proceeding is granted immunity (18 U.S.C. § 6005, Pub. L. No. 91–452 (Oct. 15, 1970)). In determining whether the statute applies to the military his dominant role supports opposite conclusions. In favor of applicability is that notice to a central law enforcement point, the Attorney General, can avoid the unhappy situation of one department of government granting immunity to a witness who is the object of a criminal prosecution of another department. (*See* 1969 Hearings 370.) In such a situation the witness will be granted use immunity and not transactional immunity. However since the prosecuting agency would have to affirmatively show that none of its evidence was derived from the compelled testimony, it is likely that very few prosecutions will follow grants of use immunity. Thus one who should be criminally prosecuted may be inadvertently relieved of criminal liability.

In favor of non-applicability is that to a great degree, military criminal law is unrelated to federal law enforcement. That which is purely military in nature has no counterpart in the civilian sphere. The non-military portion of military criminal law is more closely akin to state rather than federal law enforcement. It deals mainly with common law *malum in se* types of crime, usually associated with state criminal law rather than the *malum prohibita* crime normally associated with federal law enforcement. Therefore it can be argued that the Attorney General should not exercise veto power over military grants of immunity.

[173] *Cf.* O'Callahan v. Parker, 395 U.S. 258 (1969); United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

to grasp.[174] The Army has invoked the agency section of the Act to grant immunity to a civilian witness in the proceedings in *United States v. Calley*.[175]

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[174] The military departments have not as yet stated their position on the applicability of the Act to the military. However with the concurrence of the Department of Justice, the Army has indicated that the Act does not apply to those cases where the recipient of the immunity is subject to the Uniform Code of Military Justice and no other federal agency is involved. JAGJ 1971/7522, 19 Feb. 1971. *See also* TJAG Message JAGJ 1971/7613, Mar. 1971, which states in part:

". . . it appears at this time that the procedures contained in Title II for securing the approval of The Attorney General for grants of immunity do apply to civilian witnesses who appear before courts-martial within the Territorial limits of the United States. Conversely, it now seems that the provisions of Title II do not apply to grants of immunity tendered to military witnesses in courts-martial convened outside the United States where the case is of concern only to the military and is not of interest or concern to other agencies or departments of the United States government."

[175] *See* Washington Post, Jan. 5, 1971, at 8, col. 1. The order to testify and the approval of the Attorney General are set out below. *See also* letter from Major General Kenneth J. Hodson, The Judge Advocate General of the Army to the Honorable Will Wilson, Assistant Attorney General, Jan. 21, 1971, JAGJ 1970/9116.

APPROVAL OF ISSUANCE OF ORDER TO TESTIFY

Having been advised: (1) of the pendency before the Department of the Army of the above-styled court-martial proceedings against Lieutenant William L. Calley; (2) that upon his appearance at those proceedings pursuant to subpoena, Paul D. Meadlo did refuse to testify on the basis of his privilege against self-incrimination; (3) that the Department of the Army, by Major General Orwin C. Talbott, convening authority in the case, has found that Paul D. Meadlo possesses information relevant to the said proceedings; that his testimony is necessary to the public interest; and that he is likely to continue in his refusal to testify and provide such information on the basis of his privilege against self-incrimination; and (4) that under the provisions of 18 U.S.C. 6004 the Department of the Army by Major General Orwin C. Talbott has requested by approval of the issuance of an order, requiring Paul D. Meadlo to give the testimony and provide the information which he has refused to give or provide on the basis of his privilege against self-incrimination in the above-styled proceedings.

Now therefore, I, Will Wilson, Assistant Attorney General in charge of the Criminal Division, United States Department of Justice, pursuant to the authority delegated to me by the Attorney General of the United States in Order No. 445–70, of December 12, 1970, 28 C.F.R. § 0.175, herewith approve issuance of an order of the Department of the Army by Major General Orwin C. Talbott, requiring Paul D. Meadlo to give the testimony and provide the information which he has refused to give or provide on the basis of his privilege against self-incrimination in the above-styled proceedings, such order to become effective as provided in 18 U.S.C. 6002.

ORDER TO TESTIFY

1. As an officer empowered to convene general courts-martial and pursuant to the provisions of sections 6002 and 6004, title 18, United States Code, I hereby make the following findings:

a. Paul David Meadlo possesses information relevant to the pending trial by

The consequences for military justice if the Act is applied to the military while not being great, may be of some significance. The relatively few reported cases involving grants of immunity under the Uniform Code of Military Justice show that the authority to give grants of immunity is not crucial to the administration of military justice. Moreover as pre-trial agreements are enforced against the government without specific statutory authorization, promises not to prosecute in return for testimony could be similarly enforced.[176] That *Kirsch* is the only reported case under the Uniform Code involving a grantee's refusal to testify is further evidence of the limited scope of this problem.

If the Act is applied to the military, it can only be done on the premise that Congress intended that the United States could grant immunity by only one method, the one prescribed in the Act. It is an all or nothing proposition. The military could not successfully claim that it could employ the Act and still grant immunity under the Uniform Code of Military Justice.[177] Thus if the Act applies, a grantee of a *military* grant of immunity could not be prosecuted for refusing to testify at a court-martial after receiving the grant. This fact, the time needed to apply to the Attorney General and the District Court, and the possibility of the military losing a little

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general court-martial of Lieutenant William L. Calley and the presentation of his testimony at that trial is necessary to the public interest.

b. On 3 December 1970 Paul David Meadlo appeared pursuant to subpoena as a witness in the general court-martial trial of Lieutenant William L. Calley and repeatedly refused to testify on the basis of his privilege against self-incrimination.

c. On 4 December 1970 and various subsequent dates, Paul David Meadlo through his counsel, John A. Kesler, Esq., indicated he is likely to continue in his refusal to testify.

2. On the basis of these facts, pursuant to section 6004 of title 18, USC, I hereby order Paul David Meadlo to appear and testify before the general court-martial now convened for the trial of Lieutenant Calley. As provided in section 6002 of title 18, no testimony given by Mr. Meadlo pursuant to this order shall be used against hin any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

3. This order is issued with the approval of the Attorney General of the United States as set forth in Exhibit 1 annexed hereto.

ORWIN C. TALBOTT
Major General, USA
Commanding

[176] *See* United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); United States v. Welker, 8 U.S.C.M.A. 647, 25 C.M.R. 151 (1958); United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957); *cf.* United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969).

[177] However grants of immunity similar to enforceable equitable immunity could still be given on an informal basis. *Cf.* United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969).

more disciplinary control over its members[178] appear to be the adverse consequences of the Act.

The Act also provides advantages to the military. A uniform system of grants of immunity is established and reliance on the doubtful reasoning of the *Kirsch* case is avoided. Additionally, civilians can be granted immunity and immunity involving offenses not cognizable by court-martial can be granted. Thus a court-martial can have the benefit of hearing witnesses who might not otherwise testify.

V. CONCLUSION

The basic problem with military grants of immunity is the lack of clear statutory authorization for their use. Even in the *Kirsch* case, where the Court of Military Appeals declared that military immunity was statutory, the court had to "read between the lines" to support its conclusion. Because the conclusion in *Kirsch* is tenuous and because the examination of military immunity presented in this article leads to the conclusion that there is no statutory basis for military grants of immunity, the time has come to clarify the basis for such grants. Congress should amend the Code to give general court-martial convening authorities the power to give grants of use immunity to all witnesses, civilian and military. Moreover this immunity should be applicable for all offenses, whether or not cognizable by courts-martial, and should apply to criminal prosecutions in every federal and state court. This simple but effective statute would clarify the military law of immunity, protect witnesses, aid the administration of military justice and reinforce in another way the belief that the military's is an enlightened system of justice.

APPENDIX A

Title II of the Organized Crime Control Act of 1970 reads as follows:

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar

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[178] *See* O'Callahan v. Parker, 395 U.S. 258 (1969); United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969).

appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two

Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before

or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part. (b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized

representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

IMPLIED WARRANTIES IN GOVERNMENT CONTRACTS*

By Major George H. Dygert**

Substantial litigation has arisen over the years regarding the unwritten assumptions of parties to government contracts. This article examines the doctrine of implied warranty, studies alternative approaches to problems in the area and discusses the extent to which exculpatory clauses may avoid government liability.

I. INTRODUCTION

The government, as the largest purchaser of goods and services in this country, affects the economic life of large and small business in all parts of the United States economy. Because of the very volume of its procurement, it is not subject to the normal controls exercised by a system of competition. Contract provisions are not subject to negotiation in any real sense. The government dictates the terms of its contracts largely free from influence by the contractors who are dependent upon it for large portions of their business and who, in many cases, are dependent on such business for their very existence.[1] In such an atmosphere of adhesion contracts, the doctrine of implied warranty plays an important part in protecting the government contractor from unfair or unanticipated obligations imposed by the letter of the government contracts.

The theory of implied warranty was imported into the law of government contracts by the United States Supreme Court in 1918

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[1] *See* Cuneo & Crowell, *Impossibility of Performance, Assumption of the Risk or Act of Submission*, 29 LAW & CONTEMP. PROB. 531, 548–51 (1964).

in its decision in *United States v. Spearin*.[2] This theory is a means of imposing on the government obligations which arise out of its contracts, but which are not specifically placed on the government by the language of the contract. Implied warranties may be found where the contract is silent on a matter, where general caveatory language places risks on the contractor, and where there is specific provision that the government is not responsible for specifications, plans, and/or information provided by the government under the contract. The essence of the theory is basic fairness. It imposes on the agents of the government a duty of fair dealing and places on the government risks not fairly assumed by the contractor. The theory has been applied to prevent injury to a contractor where the contractor has been misled by erroneous government supplied information[3] or by the government's failure to disclose information,[4] where compliance with government furnished plans and specifications would not result in satisfactory performance,[5] where government inspection has been untimely,[6] where government action[7] or inaction[8] has caused unwarranted delay in or interference with the contractor's work, and where research and development obligations not reasonably predictable from the terms of the contract were required.[9] Circumstances in which the theory of implied warranty is applied have been discussed by some courts and writers in terms of "allocation of risk,"[10] "impossibility,"[11] "misrepresentation,"[12] and "mutual mistake."[13] These are hardly synonymous, however, for implied warranty is a means of alloca-

[2] 248 U.S. 132 (1918).

[3] *E.g.*, Everette Plywood and Door Corp. v. United States, 419 F.2d 425 (Ct. Cl. 1969).

[4] *E.g.*, Helene Curtis Indus., Inc. v. United States, 312 F.2d 774 (Ct. Cl. 1963).

[5] *E.g.*, N. Am. Phillips Co. v. United States, 358 F.2d 980 (Ct. Cl. 1966).

[6] *E.g.*, Russel R. Gannon Co., Inc. v. United States, 417 F.2d 1356 (Ct. Cl. 1969).

[7] *E.g.*, Roberts v. United States, 357 F.2d 938 (Ct. Cl. 1966).

[8] *E.g.*, Milwaukee Transformer Co., ASBCA No. 10814, 9 May 1966, 66–1 B.C.A. para. 5570.

[9] *E.g.*, Superior Prod. Co., ASBCA No. 9808, 21 Dec. 1966, 66–2 B.C.A. para. 6054.

[10] *See* Nash, *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693 (1966).

[11] *See* Bruner, *Impossibility of Performance in the Law of Government Contracts*, 9 A. F. JAG L. REV. 6 (1967).

[12] *See generally* Kendall, *Changed Conditions as Misrepresentation in Government Construction Contracts*, 35 GEO. WASH. L. REV. 978 (1967).

[13] *See* Note, *The Application of Common-Law Contract Principles in the Court of Claims: 1950 to Present*, 49 VA. L. REV. 772, 789–95 (1963).

tion of risk and is much broader in application than impossibility, misrepresentation or mutual mistake.[14]

II. CIRCUMSTANCES GIVING RISE TO IMPLIED WARRANTIES

Implied warranties arise from the contractual relationship between the parties. Their existence and effect depend upon the provisions of the contract, the nature of the subject matter and the actions of the parties prior to award and during performance. The theory of implied warranty, first applied in the law of government contracts to circumstances involving government furnished detailed drawings and specifications, has been expanded in application and is now applied in numerous other circumstances.

A. *CONTRACTS CONTAINING DETAILED PLANS AND SPECIFICATIONS*

The Supreme Court in *United States v. Spearin*[15] held that the government impliedly warrants that detailed drawings and specifications issued as part of a government contract will result in a satisfactory performance if conscientiously followed by the contractor. In *Spearin* the contract required the relocation of a sewer as part of the construction of a drydock. The contractor relocated the sewer in the configuration required by the contract. Later as a result of a heavy rain storm and an obstruction in a connecting sewer not shown on the drawings the newly constructed sewer broke, causing the site to flood. The contract included standard clauses requiring the contractor to investigate the site and assure himself of the conditions and to check the drawings for accuracy prior to bidding.[16] When the flooding occurred the contractor stopped work and refused to proceed until the government accepted responsibility for the flooded site and for correcting the drawings. In holding the government liable for breach of contract on the theory of implied warranty, the court specifically determined that the general exculpatory language regarding the contractor's obligation for site inspection and verification of drawings did not impose on him the obligation to determine the adequacy of the government furnished detailed drawings. The court then proceeded to award common law damages for breach of contract. The defect in drawings involved here was not a patent one readily

[14] *See* pp. 64–67, *infra*.

[15] 248 U.S. 132 (1918).

[16] Essentially the same requirements are now included in Armed Services Procurement Regulation [hereafter cited as ASPR] §§ 7.602–33 (Rev. No. 1, 31 Mar. 1969), and 7.602–45 (Rev. No. 1, 31 Mar. 1969).

discernible by a reasonable review of drawings and specifications or site investigation. Its discovery could not have been accomplished without extensive research of extracontractual drawings of existing subsurface structure.[17]

The government, in addition to drafting its own detailed drawings and specifications, incorporates into its contracts drawings and specifications developed by principal contractors and others under separate contracts. Where the government incorporated into a contract detailed specifications recommended by the contractor as more satisfactory than the government specifications, recovery on the theory of implied warranty of the specifications was denied when they failed to result in a satisfactory product.[18] The court reasoned that it is improper to charge the government with responsibility for specifications adopted at the insistence of a contractor who later found them unsatisfactory for the intended purpose. An implied warranty was found and recovery allowed where the government provided a contractor detailed production drawings developed by a third party with a warning that the drawings had not been verified and might contain errors.[19] In this case, the court specifically noted the warning and the government's and the contractor's belief that the drawings would be satisfactory for use. It then determined that the warning was merely a statement of fact that the drawings had not been checked by the government.[20]

In two-step formal advertising the government initially sets out performance specifications in its step one request for technical proposals.[21] Only potential contractors who have submitted acceptable technical proposals are allowed to bid during step two in response to the formal advertised request for bids.[22] Each contractor who bids in step two is bidding for a contract consisting of the government's performance specifications *and* the detailed drawings and specifications of *his own technical proposal* which for purposes of his bid have been incorporated as part of the government plans and specifications.[23] The government has specifically determined that the technical proposal is acceptable before adver-

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[17] *See* pp. 43–47, *infra*, for discussion of the scope of the contractor's obligation in conducting prebid investigation and review. Where investigation of such scope will not reveal defects in detailed drawings and specifications, as is the situation in the instant case, the contractor has no obligation to determine their adequacy.

[18] Austin Co. v. United States, 314 F.2d 518 (Ct. Cl. 1963).

[19] N. Am. Phillips Co. v. United States, 358 F.2d 980 (Ct. Cl. 1966).

[20] *See* pp. 69–70, *infra*, for discussion of the effect of exculpatory provisions.

[21] ASPR §§ 2.501 (1 Jan. 1969) and 2.503–1 (1 Jan. 1969).

[22] ASPR §§ 2.501 (1 Jan. 1969) and 2.503–2 (1 Jan. 1969).

[23] *Id.*

tising for bids in step two; however, the detailed specifications and drawings are accepted at the suggestion of the contractor who by proposing them represents his belief that they will yield the desired performance. This is very similar to the situation found in *Austin Co. v. United States*.[24] However, there is one substantial difference. In the two-step formal advertising process the potential contractor must develop and submit a technical proposal if he is to be considered for award of the contract. In *Austin*, the contractor was a volunteer—the contract would have been performed utilizing specifications furnished by the government had he not requested incorporation of the specifications he submitted. This factual difference must be considered when the court determines whether the detailed drawings and specifications submitted by the contractor in his technical proposal in two-step formal advertising are warranted by the government. It is suggested that this difference does not have sufficient significance to support a result contrary to that reached by the court in *Austin* and that no implied warranty of adequacy of the detailed drawings and specifications would be found.

There is no implied warranty that a structure constructed according to government furnished specifications will withstand all natural disasters which may occur prior to acceptance.[25] The warranty is merely that a satisfactory result will be achieved under normal circumstances, *not* that the contractor is protected against all eventualities.

The implied warranty that a satisfactory result will be achieved when detailed plans and specifications furnished by the government are followed applies to the *contract*. In determining the adequacy of the contract, all of its parts must be examined and read together.[26] This interpretation must be based on good faith and made with regard to good practice within the particular industry. The elements which must be considered will vary with the type of contract, the complexity of its provisions and whether the drawings and specifications are self-contained or refer to items or documents not within their corners. The drawings and specifications need not be so explicit that it is absolutely impossible to misinterpret them. The government is obligated to provide drawings and specifications that are reasonably complete and accurate;

[24] 314 F.2d 518 (Ct. Cl. 1963).

[25] Elec. and Missile Facilities, Inc., FAACAP No. 66–17, 6 Dec. 1965, 65–2 B.C.A. para. 5260.

[26] *E.g.*, Flippin Materials Co. v. United States, 312 F.2d 408 (Ct. Cl. 1963), and Highland Constr. Corp., CGBCA Nos. T–222, T–239, T–244, T–255, T–257 and T–262, 20 Jan. 1967, 67–1 B.C.A. para. 6094.

however, the contractor must make more than a cursory examination of such documents. He is charged with the knowledge that a reasonably careful cautious bidder would have gleaned from the contract documents while preparing his bid.[27] Attempted recovery for minor errors or omissions in the drawings and specifications which a contractor experienced in the field would recognize as necessary for the satisfactory function of the product will be defeated, not on warranty grounds, but because the contractor failed to give the contract a reasonable interpretation.[28] Reliance on either the drawings or the specifications without giving consideration to the provisions of the other does not meet the required standard of performance.[29] In a case where a contractor claimed additional compensation for disassembling a government furnished model and for making complete drawings using it as a pattern, the board allowed recourse to parol evidence to show that the contractor had been advised at a prebid conference that this would be required.[30] The significance of the requirement to consider the whole contract is emphasized in this case because the specifications provided that the government would furnish all drawings required for the performance of the contract. There is no question that the board considered that the model was part of the contract. The board has also held that a model which differs from the specifications furnished under the contract must be considered by the parties in determining what the contract requires,[31] as must the brand name product specified in an "or equal" specification.[32]

When a contractor should know from industry practice that the government has in its files certain information which is pertinent to the contract, he is charged with knowledge of it because it is part of the contract even though it is not referred to specifically in

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[27] Earl L. Cump, ASBCA No. 3812, 29 Jul. 1957, 57-2 B.C.A. para. 1369.

[28] Highland Constr. Corp., CGBCA Nos. T-222, T-239, T-244, T-255, T-257 and T-262, 20 Jan. 1967, 67-1 B.C.A. para. 6094. In this case the contractor claimed additional compensation for installing hinges and locks on the doors of a building and for installing rigid insulation rather than blanket flexible insulation. The drawings and specifications omitted any mention of locks and hinges and required insulation without specifying the type. The board denied recovery because any experienced contractor would recognize that the product would be completely unsuited for its intended purpose without these items.

[29] Baize Int'l. Inc., ASBCA Nos. 6372, 6478 and 6879, 21 Nov. 1963, 1963 B.C.A. para. 3963.

[30] Elmira Sales Corp., ASBCA No. 7585, 16 Mar. 1964, 1964 B.C.A. para. 4105.

[31] Seaview Elec. Co., ASBCA No. 6966, 31 Aug. 1961, 61-2 B.C.A. para. 3151.

[32] PRL Elec., Inc., ASBCA No. 9183, 28 Sep. 1964, 1964 B.C.A. para. 4442.

the contract documents.[33] Although there is an implied warranty that government furnished material will be sufficient for the purpose for which it is furnished, the contractor cannot close his eyes to an "as is" provision relating to this equipment included in the contract and assume that the equipment is satisfactory. Under such circumstances no implied warranty arises with regard to the conditions which would have been apparent in a reasonably conscientious inspection.[34]

The contractor is charged with knowledge of all patent defects and ambiguities which would be discoverable by a prebid review of the scope discussed above. Failure to secure an authoritative interpretation from the contracting officer prior to submitting a bid or embarking on performance will preclude recovery on the theory of implied warranty of adequacy of the plans and specifications when the contractor's interpretation is erroneous.[35] Failure to inquire about latent defects does not preclude recovery on the theory of implied warranty.[36] It is clear that the contractor is charged with knowledge and with securing clarification of discrepancies between differing provisions of one drawing and between different drawings under the contract.[37] Reliance upon the provisions of a changed drawing which conflict with unchanged drawings without seeking clarification of the discrepancy may prevent recovery.[38] The requirement to seek clarification has been applied to deny recovery on the theory of implied warranty for extra work in installing lighting fixtures shown on the architectural drawings but not on the electrical drawings under a contract lacking caveatory provisions warning the contractor to bring such discrepancies to the attention of the government.[39] The contractor is charged with knowledge of the characteristics of the product specified in an "or equal" specification. Where he, without seeking clarification, provides an item that complies with the specifications issued under the contract but which differs from that product, there is no warranty that the specifications are adequate.[40] Where a particu-

[33] Flippin Materials Co. v. United States, 312 F.2d 408 (Ct. Cl. 1963).

[34] L.T. Indus., Inc., ASBCA No. 12832, 25 Feb. 1969, 69–1 B.C.A. para. 7534.

[35] *E.g.*, Chavis Constr. Co., Inc., ASBCA No. 13501, 7 Feb. 1969, 69–1 B.C.A. para. 7516, and Gus Kraus d/b/a Condor Mach. Works, ASBCA No. 5535, 25 Mar. 1960, 60–1 BC.A. para. 2568.

[36] Joplin v. United States, 58 F. Supp. 753 (Ct. Cl. 1939).

[37] Chavis Constr. Co., Inc., ASBCA No. 13501, 7 Feb. 1969, 69–1 B.C.A. para. 7516.

[38] Elec. and Missile Facilities, Inc., ASBCA No. 9613, 7 Dec. 1965, 65–2 B.C.A. para. 5263.

[39] George F. Jenson, Contractor, Inc., GSBCA No. 1167, 23 Apr. 1964, 1964 B.C.A. para. 4196.

[40] PRL Elec., Inc., ASBCA No. 9183, 28 Sep. 1964, 1964 B.C.A. para. 4442.

lar process is required by the specifications there is an implied warranty that it will achieve a satisfactory result and the contractor has no obligation to verify that provision of the contract although he had previously found the process unsatisfactory under similar conditions under a different government contract.[41] Where the government has marked drawings in detail showing existing conditions there is no requirement that the contractor perform additional inspection. He may recover for extra work caused by the variance between the existing conditions and the conditions shown on the drawings.[42] However, he may not rely on provisions of the contract which he knows are contrary to existing fact.[43]

In 1959 the Armed Services Board of Contract Appeals unequivocally stated that alternative processes and procedures included in specifications but not expressly mandated do not raise an implied warranty that they will result in satisfactory performance.[44] This position has been completely reversed. In three later cases, boards of contract appeals have held that processes which are specified as allowable alternatives under a contract are all warranted to be satisfactory.[45] Litigation has also resulted from a contract requiring materials meeting a minimum standard for use in the fabrication of an item required to meet specified performance standards. The board has reasoned that there are two separate requirements that must be met and has held that there is no implied warranty that material meeting the minimum standard specified will result in satisfactory performance.[46] Had the contract called for use of a particular material or alloy rather than one meeting specified minimums, an implied warranty probably

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[41] M–K–O, ASBCA No. 9740, 27 Dec. 1965, 65–2 B.C.A. para. 5288.

[42] Markowitz Bros., Inc., GSBCA No. 922, 31 Jan. 1964, 1964 B.C.A. para. 4054.

[43] Ross Eng'r. Co., 103 Ct. Cl. (1945), *cert. denied*, 326 U.S. 735 (1945). In this case the court held that no warranty arose that the site would be available to the contractor on the date specified in the contract because it was apparent at the time the contractor submitted his bid that the foundation contract would not be complete until several months after the date specified in the contract for site availability.

[44] Nat'l U.S. Radiator Corp., ASBCA No. 3972, 21 Oct. 1959, 59–2 B.C.A. para. 2386. "[W]e are not aware of any decision where this doctrine of implied warranty or representation as to the adequacy of Government specifications has been extended to manufacturing processes and procedures not expressly mandated by the Government specifications" (at 11088).

[45] Coe Constr., Inc., IBCA Nos. 632–4–67 & 687–11–67, 28 May 1969, 69–1 B.C.A. para. 7687, J. G. Watts Constr. Co., ASBCA No. 9445, 11 Jan. 1965, 65–1 B.C.A. para 4616, and E. W. Bliss Co., ASBCA No. 11297, 26 Jun. 1968, 68–2 B.C.A. para. 7090.

[46] Peters and Co., Inc., ASBCA No. 7252, 19 Feb. 1962, 1962 B.C.A. para. 3302.

would have been found to exist. Similarly, a specification calling for the use of "the standard product of a reputable manufacturer" does not warrant that any such standard product will result in satisfactory performance, but merely requires that the contractor start with such a product and modify it as necessary to meet the performance requirements of the specifications.[47] The cases involving specifications which require material meeting minimum standards and standard products of a reputable manufacturer appear to be based on the rationale that such requirements are not detailed specifications because they do not dictate use of a particular item but allow the contractor to select any item equaling or exceeding the required minimum standards.

The theory of implied warranty of detailed drawings and specifications, initially established in the law of government contracts in a case involving a construction contract, has had continued application in such contracts[48] and has been expanded into the field of supply contracts.[49] In cases arising under either of these types of contracts, the theory is employed to achieve a fair allocation of the costs incurred as a result of errors in the detailed drawings and specifications.

B. *PERFORMANCE SPECIFICATION CONTRACTS*

The theory of implied warranty has been applied in numerous cases to resolve disputes arising from performance type specifications. In view of the fact that the contractor acts at his peril if he does not perform a comprehensive examination of a contract containing detailed plans and specifications, it might be expected that he would be charged with what a similar examination would reveal under contracts incorporating specifications of the performance type. However, the existence or nonexistence of implied warranties in the latter area is dependent upon the specifications themselves and the preaward actions or lack of action by the government.

For the most part, the cases seem to arise out of contracts which require the development of a new product or component.[50]

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[47] Elec. and Missile Facilities Inc., ASBCA No. 9613, 7 Dec. 1965, 65–2 B.C.A. para. 5263.

[48] *E.g.*, J.L. Simmons Co., Inc., 412 F.2d 1360 (Ct. Cl. 1969).

[49] *E.g.*, No. Am. Phillips Co. v. United States, 358 F.2d 980 (Ct. Cl. 1966), and Helene Curtis Indus., Inc. v. United States, 312 F.2d 774 (Ct. Cl. 1963).

[50] *E.g.*, Maxwell Elec. Corp., ASBCA Nos. 8261 & 8443, 14 Oct. 1963, 1963 B.C.A. para. 3916, Superior Prod Co., ASBCA No. 9808, 21 Dec. 1966, 66–2 BC.A. para. 6054, and E. L. Cournand and Co., ASBCA No. 2955, 29 Sep. 1960, 60–2 B.C.A. para. 2840.

The contract in *Maxwell Electronics Corporation*[51] was for the purchase of common electrical meters. It called for a brushless motor with a specified frequency range which had not been produced before as one component of the meters. The contractor's attention was not specifically directed by the government to this provision of the contract. After discussing the government's failure to point out the requirement for developing such a motor the board held that in such circumstances the contractor had not agreed to develop a new component, but only to incorporate an already available component. The board relied on implied warranty of adequacy of specifications by stating that the specifications were detailed rather than performance specifications because they called for a brushless motor with a specified frequency range. If the subject of the contract had been only the development of such a motor the same specifications would probably have been considered purely performance type. The decision indicates that there is an implied warranty that the government will emphasize any requirements for development of products not previously manufactured which are included as components in common items.

The board has found a breach of implied warranty where the government advertised for bids on a contract for the development of an end product not previously manufactured without warning the contractor during preaward conferences or otherwise specifically pointing out the novelty of the item in the contract:

> We fail to find, however, in the record anything which would indicate that P. O. 201 was presented to bidders in any way as an aleatory undertaking. There was no discussion of the specifications with bidders, no prebid conference with interested parties, no indication that technical problems of manufacture were unresolved or that in fact the product with the specific asphalt content and 5 minute recovery parameters was a heretofore unknown application of polyurethane foam.[52]

The government is not required to apprise the contractor of the novelty of the product in any particular way. However, the means it chooses must be sufficiently inconsistent with the normal prac-

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[51] ASBCA Nos. 8261 & 8443, 14 Oct. 1963, 1963 B.C.A. para. 3916.

[52] Superior Prod. Co., ASBCA No. 9808, 21 Dec. 1966, 66–2 B.C.A. para. 6054, at p. 27982.

tice followed in procuring standard items to be readily noticeable.[53]

The performance specifications warranty does not warrant that the performance required under the contract will be possible. Its substance is that there is a general warranty that the government will notify contractors prior to seeking bids on any item requiring research and development. Where the contractor has been made aware that a desired product has never been produced commercially and thus extensive research and development may be required, claims based on implied warranty have not been successful under a fixed price contract.[54]

Previously these situations were discussed in terms of superior knowledge. In the cases where the government had not properly advised the contractor of the required new development, an implied warranty was found on the basis of the government's superior knowledge.[55] In the cases where the government adequately notified the contractor of the anticipated new development it was held that there was no implied warranty or impossibility.[56] In 1966 the Court of Claims apparently discarded the theory that superior knowledge was a necessary requisite to the existence of an implied warranty by reversing the holding of the Armed Services Board of Contract Appeals in *Hol-Gar Manufacturing Company v. United States*.[57] The government had requested proposals

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[53] In E. L. Cournand and Company the board discussed at some length the provisions of the contract and other factors which it considered in determining that the government had not met this burden. ASBCA No. 2955, 29 Sep. 1960, 60–2 B.C.A. para. 2840. "The form, content, and funding of the contract are as commonly employed for supply production contracts, and the form and content of the said specification are those of the usual supply production specification intended for competitive commercial bid or quotation, as appears to be the present case (par. 18). With reference to the word 'design' in the specification, and the requirement there and in the contract for 'design approval' (pars. 19, 20, 22), upon which the Government places particular emphasis, we note that the use of the word 'design' may be consistent with either type of undertaking . . . . The short period of three weeks stated in the contract for the submission of design approval drawings, for example, is more consistent with the concept of ordinary preliminary manufacturing or construction shop or field design drawings than with the concept of an extended development and design undertaking" (at 14762).

[54] *E.g.*, Clavier Corp., ASBCA No. 11884, 17 Mar. 1969, 69–1 B.C.A. para. 7614, Consol. Avionics Corp., ASBCA Nos. 6315 & 6433, 14 Oct. 1963, 1963 B.C.A. para. 3888, and Electro-Nuclear Laboratories, Inc., ASBCA No. 9863, 10 Feb. 1965, 65–1 B.C.A. para. 4682.

[55] *E.g.*, Superior Prod. Co., ASBCA No. 9808, 21 Dec. 1966, 66–2 B.C.A. para. 6054, and Metal Bldg. Specialities Co., ASBCA No. 8651, 22 Oct. 1963, 1963 B.C.A. para. 3943.

[56] PRL Elec., Inc., ASBCA No. 9183, 28 Sep. 1964, 1964 B.C.A. para. 4442.

[57] 360 F.2d 634 (Ct. Cl. 1966).

for electric generators incorporating an engine for which it had specified numerous characteristics, including maximum weight. The request for proposal required submission of a technical proposal by any interested contractor. Plaintiff submitted a technical proposal in which it indicated that it knew of only one engine meeting the detailed characteristics and the performance requirements of the contract. A discussion of the difficulties involved followed and after negotiation the plaintiff was awarded the contract on a fixed price basis. The engine failed to meet the required performance tests and a claim for expenses in trying to meet the performance requirements was submitted. The board denied relief on the basis that the government had no superior knowledge and that the contractor was fully aware of the requirements and difficulties at the time of its proposal.[58] The Court of Claims held that the specifications relating to the engine were detailed specifications. Accordingly, the contractor was entitled to recover under the implied warranty that the government's detailed specifications were adequate and if followed would result in satisfactory performance. This seems to indicate that in any case where there are detailed government specifications for any component and performance is impossible recovery will be available on an implied warranty theory, whether or not the government has advised the contractor of the requirement for innovation and other difficulties, and regardless of the relative expertise of the government and its contractor. This interpretation was subsequently applied by the Armed Services Board of Contract Appeals.[59] Following this reasoning, the government would guarantee the success of all its contracts requiring the development of a new item if it specified

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[58] Hol-Gar Mfg., ASBCA No. 6865, 24 Oct. 1962, 1962 B.C.A. para. 3551.

[59] Consol. Diesel Elec. Corp., ASBCA No. 10486, 17 Oct. 1967, 67–2 B.C.A. para. 6669. "The Government's implied warranty of the adequacy of its specifications is based on its responsibility for the specifications rather than any presumed 'superior knowledge' in the sense of greater expertise. When one of the parties to a contract undertakes to prepare the specifications, that party is responsible for the correctness, adequacy and feasibility of the specifications, and the other party is under no obligation to check and verify the work product of the party who assumed responsibility for the preparation of the specifications, even though he may be as much or more of an expert than the party who prepared the specifications . . . . It is a misapplication of the superior knowledge concept when the implied warranty of the adequacy of the specifications is made to depend on whether the Government or a particular contractor has greater knowledge, experience and expertise in the technical field to which the specifications relate. The Government cannot be relieved from its responsibility for the proper preparation of the advertised specifications on the ground that the successful bidder is more of an expert on the item involved than is the Government" (at 30,951–52).

any of the characteristics of the product even if awarded on a fixed price basis.

The product contracted for in *Hol-Gar* was essentially a standard item and both the government and the contractor expected that it would use a previously developed and produced engine as a power source. In this respect the case resembles *Maxwell Electronics Corporation*.[60] From a comparison of the two cases it appears that the government cannot eliminate an implied warranty that standard production items will result in a satisfactory end product by notifying the contractor of possible problem areas in a contract calling for the use of components with some details specified but which appear to be essentially standard items. In the later case of *Clavier Corporation*[61] the board did not follow this expansive theory of implied warranty. After finding that the performance required under the contract specifications was impossible, it looked to the type of contract and the knowledge of the contractor of the undertaking. It found that the government had specified the use of a particular component in an x-radiation detector, that the contractor was aware that a device using this component had not been manufactured before, and that considerable research would be required in performance. The board found no implied warranty and denied recovery, holding that the specifications were predominantly performance type and that the contract was essentially one of research and development.

In this case the board characterized the specifications as performance type although the nature of an important component was specified. In both *Maxwell* and *Consolidated Diesel* the specifications contained end product performance requirements and some detailed provisions relating to the components. The characterization of the specifications as detailed or performance type appears directly related to the court's determination of the existence or nonexistence of an implied warranty. Where they are characterized as detailed specifications an implied warranty has been found. Where they are characterized as performance specifications an implied warranty has not been found. The courts and boards have not distinguished portions of the specifications relating to one component from the specifications as a whole even where the component and specifications relating to it are easily severable from the remainder of the product and the overall specifications. In each case, the court and board have considered the overall contract and characterized the specifications on a dominant

[60] ASBCA Nos. 8261 & 8443, 14 Oct. 1963, 1963 B.C.A. para. 3302.
[61] ASBCA No. 11884, 17 Mar. 1969, 69–1 B.C.A. para. 7614.

or major purpose basis.[62] The criterion for determining the characterization of the specifications appears to be the relative significance of the details specified with regard to the product to be provided under the contract. It may be expected that specifications issued under the two-step formal advertising method will be characterized as performance type and no implied warranty of adequacy found. As discussed previously, the government's specifications in step one are performance type. The incorporation of the contractor's technical proposal into the standard he bids on in step two should not cause the government to be liable for material contained in that proposal.[63]

When the contractor is fully cognizant of the obligation he is undertaking in a contract principally for research and development or otherwise of a performance type there is no implied warranty that purely performance specifications or performance specifications in which some minimal requirements for specific details are included are possible of performance. In a similar contract where the contractor has not been fully advised of such requirements, for example, where he reasonably expects from all the circumstances that he is to incorporate a previously developed component, an implied warranty will be found to exist.

C. *DUTY NOT TO INTERFERE*

In expanding the theory of implied warranty beyond cases involving deficiencies in drawings and specifications, the courts and boards have found an implied warranty that the government will not hinder or interfere with the contractor's performance under the contract.[64] Where the government has an obligation to perform acts necessary to the performance of the contract it must accomplish its tasks properly or it will be held liable to the contractor for delays and extra work caused by its unsatisfactory performance.[65] The government violates this warranty if its

[62] *E.g.*, Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1966), Clavier Corp., ASBCA No. 11884, 17 Mar. 1969, 69–1 B.C.A. para. 7614, Electro-Nuclear Lab., Inc., ASBCA No. 9863, 10 Feb. 1965, 65–1 B.C.A. para. 4682, Maxwell Electronics Corp., ASBCA Nos. 8261 & 8443, 14 Oct. 1963, 1963 B.C.A. para. 3302.

[63] *See* pp. 42–43, *supra*.

[64] J. G. Watts Constr. Co. v. United States, 355 F.2d 573 (Ct. Cl. 1966).

[65] *Id.* The government was to provide grade stakes for the contractor's use under the contract. The contractor used the stakes provided and set by the government without verifying their accuracy and as a result was required to perform more and costlier excavation than the contract required because of errors in setting the stakes. The court held the government's failure to be a breach of the warranty not to hinder.

agents take over the organization and direction of the contractor's operation even where the contractor is incompetent and inefficient and apparently would be unable to perform otherwise.[66] A similar violation occurs where the government's agents interfere with the contractor's work schedule and direct him to proceed when he otherwise would have stopped work during a season when weather conditions precluded satisfactory performance.[67] There is no implied warranty that the government will assure that work on off site facilities connected with the subject of a contract will be completed in time to allow use by the contractor during his performance where his contract is silent with regard to provision of such facilities.[68] Limiting the contractor to one method of performance when the contract does not specify a particular method is a breach of the warranty not to interfere.[69]

Where the government issues more than one contract for performance on the same site at the same time it does not impliedly warrant that either of the contractors will conform their work schedule to that of the other, nor that the government will accelerate the work under one contract to conform it to the progress schedule of the other contractor even when the contracts require that both contractors will refrain from committing acts which delay the other.[70] There is no implied warranty that the government will not issue later contracts in the same limited labor market which will cause the contractor's costs of labor to increase or make labor unavailable at the wage scale that is included in the contract, nor that the government will adjust the wage scale in the contract because of the higher wage scale in the later contract.[71] However, the government has been held to breach its implied warranty not to interfere by awarding a contract to perform in an area where it awarded 26 other contracts during substantially the same period without informing the contractor of the other contracts.[72] This seems to be an exception to the general rule because of the large number of contracts. Where the government fails to make a site available when the contractor is prepared to start work and the contract does not specify a specific date that

[66] Roberts v. United States, 357 F.2d 938 (Ct. Cl. 1966).

[67] Brighton Sand and Gravel Co., ASBCA No. 11277, 18 Oct. 1966, 66–2 B.C.A. para. 5905.

[68] Fort Sill Associates, ASBCA No. 7482, 12 Sep. 1963, 1963 B.C.A. para. 3869.

[69] Elec. and Missile Facilities, Inc., ASBCA No. 9613, 7 Dec. 1965, 65–2 B.C.A. para. 5263.

[70] United States v. Blair, 321 U.S. 730 (1944).

[71] United States v. Beauttas, 324 U.S. 768 (1945).

[72] J. A. Jones Constr. Co. v. United States, 84 F. Supp. 643 (Ct. Cl. 1949).

the site will be available there is a breach of the warranty not to hinder.[73]

The courts have not recognized that the implied warranty of noninterference will allow recovery for misinformation provided during in progress inspections. The standard clause warning the contractor that in progress inspection does not operate as acceptance precludes reliance upon the informed opinion of a government representative that an item is satisfactory.[74] The contractor is responsible for maintaining his own in-progress inspection and there is no implied warranty that government inspectors will discover all defects nor that they will bring all known noncompliances to the attention of the contractor.[75]

The government does not impliedly warrant that it will not exercise its prerogatives as a sovereign. The doctrine of sovereign act is applied to deny recovery for damages suffered as a result of an act judicially determined to have been taken by the government in its sovereign capacity rather than in its contractual capacity.[76] The consideration by the court in such cases is not whether the sovereign can properly contract away its right to act, but which party will bear the loss resulting from acts taken in its sovereign capacity. Viewed in this way there appears to be no public policy which would preclude use of the theory of implied warranty to place the burden of loss from sovereign acts on the government. The result of such a procedure would place no greater burden on the government than results from application of the theory of implied warranty in any other situation and would not hinder the government in the exercise of its sovereign prerogatives. All governmental acts are those of a sovereign and determination of the nature of a particular act as sovereign or contractual within the meaning of this doctrine is difficult and often leads to strained reasoning and unsatisfactory results.[77] Application of the theory of implied warranty in this area would remove the need to make such a distinction because the consequences of contractual acts and sovereign acts would be essentially the same.

The implied warranty not to interfere has been utilized to allow

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[73] Dale Contsr. Co., Inc. v. United States, 168 Ct. Cl. 692 (1964).

[74] Ruscon Constr. Co., ASBCA No. 9794, 14 Oct. 1965, 65–2 B.C.A. para. 5146.

[75] Penn Constr. Co., ASBCA No. 10780, 25 Aug. 1966, 66–2 B.C.A. para. 5800.

[76] *E.g.*, Amine Bros. Co. v. United States, 372 F.2d 485 (Ct. Cl. 1967).

[77] *See* Speidel, *Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts*, 51 GEO. L. J. 516 (1963), for a discussion of the relationship between the government's implied warranty of noninterference and the doctrine of sovereign act.

recovery to contractors for costs resulting from unexpected government acts of interference which substantially altered the normal conditions under which similar contracts are performed. An exception is that recovery has generally not been allowed when the act complained of was actually the exercise of a legitimate governmental prerogative not directly related to the contract. An example of this is the award of other contracts for performance in the same geographical location. Basic fairness to contractors on one hand and to the government on the other has resulted from this process. Continued application of the theory of implied warranty in a similar manner may be expected to continue.

D. *AFFIRMATIVE DUTY TO ASSIST*

There is an affirmative implied warranty that the government will do all that is necessary to enable the contractor to perform.[78] The Court of Claims and the Armed Services Board of Contract Appeals have discussed this obligation in conjunction with the obligation of noninterference and often stated that the government, while having an obligation not to interfere, has no obligation to affirmatively assist the contractor in the performance of his contract.[79] This language should not be read too broadly. Typically it has been used when the court or board denied a claimed obligation which was not related closely enough to the work to be performed under the contract to cause an implied warranty to arise.[80] This situation is often found where the claimed obligation would cause another contractor to vary his performance or would interfere with the government prerogative to proceed with other contracts.[81]

Where the contractor is required by the contract to conduct certain tests in the presence of a government inspector, there is an implied affirmative obligation to have an inspector available when the contractor is ready to run the tests.[82] A requirement by the contracting officer that the contractor notify the government a substantial time in advance of the time that the inspector is required breached this warranty.[83] There is an implied warranty

[78] *E.g.*,, Russel R. Gannon Co., Inc. v. United States, 417 F.2d 1356 (Ct. Cl. 1969), and Nanofast, Inc., ASBCA 12545, 18 Mar. 1969, 69–1 B.C.A. para. 7566.

[79] *E.g.*, Banks Constr. Co. v. United States, 364 F.2d 357 (Ct. Cl. 1966), and Fort Sill Associates, ASBCA No. 7482, 12 Sep. 1963, 1963 B.C.A. para. 3869.

[80] *Id.*

[81] *See* United States v. Beauttas, 324 U.S. 768 (1945), and United States v. Blair, 321 U.S. 730 (1944).

[82] Russel R. Gannon Co., Inc. v. United States, 417 F.2d 1356 (Ct. Cl. 1969).

[83] *Id.*

that the government will not impose standards of inspection exceeding those established in the contract.[84] This is not to say that the inspections and tests must be exactly those established in the contract. The government may utilize tests which are not called for in the contract in determining compliance with its terms so long as these tests do not impose a different or higher standard than that required by the contract.[85] Implicit in the warranty against imposition of inspection standards exceeding those established in the contract is the obligation to utilize inspection equipment that is accurate and will not, because of its defects, require a different or higher actual standard of performance. The government has been held to have violated this implied warranty by use of such defective test equipment.[86]

The government's failure to perform acceptance inspection adequately may preclude termination for default. When the contractor tenders conforming goods prior to termination there is an implied warranty that the government will perform appropriate acceptance tests and inspection.[87] Failure to do this precludes termination for failure to meet earlier delivery dates. In meeting this obligation the government must disclose to the contractor the information necessary for him to evaluate the test results and determine what corrections are required when items have been rejected.[88] However, the government's right to inspect during performance under the standard inspection clause[89] is for its benefit only and not for that of the contractor.[90] As a result contractors have been unable to recover on the theory of affirmative implied warranty of assistance for the government's failure to discover defects during in-progress inspection or its failure to disclose knowledge of such defects to the contractor. An exception to this general rule is found when the contract, in addition to the stand-

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[84] *E.g.*, American Machine and Foundry Co., ASBCA 10772, 21 Feb. 1968, 68–1 B.C.A. para. 6900, and Emerson-Sack-Warner Corp., ASBCA No. 9164, 8 Oct. 1964, 1964 B.C.A. para. 4483.

[85] N. Piorito Co., Inc. v. United States, 180 Ct. Cl. 281 (1967), Gibbs Shipyard, Inc., ASBCA No. 9809, 10 Jul. 1967, 67–2 B.C.A. para. 6499, and TEMCO, Inc., ASBCA No. 9588, 23 Apr. 1965, 65–1 B.C.A. para. 4822.

[86] Bulova Research and Dev. Laboratories, Inc., ASBCA No. 6479, 26 Apr. 1963, 1963 B.C.A. para. 3720.

[87] Superior Fuse and Mfg. Co., ASBCA Nos. 7756, 7757, 7759, 7760, 7770, 7772, 7773, 7823, 8489, 8490 and 8491, 18 Jan. 1963, 1963 B.C.A. para. 3639.

[88] Space Dynamics Corp., ASBCA 12085, 30 Apr. 1969, 69–1 B.C.A. para. 7662.

[89] ASPR §§ 7.103–5 (Rev. No. 1, 31 Mar. 1969), and 7.602–11 (Rev. No. 1, 31 Mar. 1969).

[90] Lox Equipment Co., ASBCA No. 8518, 30 Sep. 1964, 1964 B.C.A. para. 4469.

ard inspection clause, contains a provision specifically requiring the government to perform a particular in-progress inspection. In such a case the contractor may recover for extra work necessitated by the government's failure to discover and disclose defects which should have been revealed in such an inspection.[91]

When the contractor can show that, based on reasonable grounds, he believes that goods delivered under the contract conform to the contract, there is an implied warranty that the government will perform appropriate acceptance inspection of substantially conforming goods and allow a reasonable time for correction of deficiencies of a correctable nature.[92] The government's failure to perform acceptance inspection within a reasonable time after notification that the subject of the contract is complete when it in fact is complete renders the government liable for losses to the contractor as a result of such delay.[93]

Further examples of this affirmative duty may be found where the government must render approvals of contractor proposals under the contract. The government must act within a reasonable time to approve any proper shop or production drawings required to be submitted.[94] When a contractor brings errors in the government's detailed plans and specifications to its attention. the government must act within a reasonable time to issue a change order.[95] Termination for default is improper after receipt of a request for a change order when the contractor in good faith believes that the specifications are impossible of performance and an unreasonable time has passed without action on the request.[96] It must be stressed that the termination for default was improper, not because there was found to be an implied warranty against premature termination for default, but because the termination was based on a failure to perform resulting from the action or inaction of the government, which breached a recognized implied warranty under that particular contract. This question was pre-

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[91] Gordon H. Ball, Inc., ASBCA No. 8316, 14 Oct. 1963, 1963 B.C.A. para. 3925.

[92] Nanofast, Inc., ASBCA No. 12545, 18 Mar. 1969, 69–1 B.C.A. para. 7566.

[93] H. Halverson, Inc., Eng. C. & A.B. No. 730, 10 Jun. 1955.

[94] *E.g.*, Charles H. Berry, Gen. Contractor, Inc., DOT CAB 67–47, 25 Jun. 1969, 69–2 B.C.A. para. 7775.

[95] *E.g.*, Laburnum Constr. Corp. v. United States, 325 F.2d 451 (Ct. Cl. 1963). In this case the court held that the government had acted unreasonably where it had allowed sufficient time to pass to require the contractor to change his planned sequence of construction. Bell v. United States, 404 F.2d 975 (Ct. Cl. 1968).

[96] Milwaukee Transformer Co., ASBCA 10814, 9 May 1966, 66–1 B.C.A. para. 5570.

sented to the Court of Claims in *Dale Construction Company v. United States.*[97] In that case the contractor's performance was prevented by financial inability caused by a restraining order preventing payment of money due under the contract. This order had been issued after termination for default on a prior government contract. The termination was later found to be improper and converted to a termination for convenience. The contractor received an equitable adjustment under the earlier contract. However, the court denied the contractor's claim for relief under the later contract. The theory of implied warranty was not discussed in the opinion, but the court's denial of relief works as a direct finding that there is no warranty against improper termination for default.

The Court of Claims has held that the government can cut off a contractor's right to bring an action for breach of implied warranty by termination for convenience, after the breach has occurred but prior to institution of suit by the contractor.[98] In this case the contractor sued for common law damages in addition to the recovery allowed under the termination for convenience clause.[99] He argued that there is an implied warranty that the government will not terminate for convenience when it has knowledge of its own breach solely to avoid the consequences of that breach. The language of the court was not limited to the factual situation of the case. The court stated that the government has an absolute right to terminate for convenience for any reason. This absolute right to terminate for any reason would allow termination for convenience at any stage of the performance and would include termination for convenience subsequent to initiation of suit by the contractor. This appears to give the government the opportunity to cut short any action for such a breach, and prevent recovery in excess of an equitable adjustment.

It appears that the courts and boards have found that fairness to the contractor requires the government to fulfill certain affirmative obligations not specifically set out in the contract in those situations where the circumstances are within its control. There is no indication of a retreat from this position and it may be expected that this affirmative implied warranty of assistance will continue to be applied to achieve a fair allocation of risk in cases

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[97] 168 Ct. Cl. 692 (1964).

[98] Nolan Bros., Inc. v. United States, 405 F.2d 1250 (Ct. Cl. 1969).

[99] ASPR § 7.602-29 (Rev. No. 8, 30 Sep. 1970). ASPR § 7.103-21 (Rev. No. 1, 31 Mar. 1969), provides for termination for convenience in supply contracts.

where the courts believe that a reasonable amount of government assistance to the contractor is imperative.

E. *SPECIFIED QUANTITY CONTRACTS*

Contracts for purchase or sale of items normally described as numbers of individual units may be requirements contracts or contracts for specified amounts. In both types of contracts the subject matter may be specified as an approximate quantity. In a requirements contract it is recognized by both parties that the government's needs will govern the quantities to be provided and that the approximate quantities indicated in the contract may change substantially. In such a contract the government is charged with an implied warranty of fair dealing. A failure to advise the supplier within a reasonable time after a change in the requirements becomes known to the government's agents will result in a breach of the government's warranty. The contractor is entitled to recover for losses incurred while preparing to perform in accordance with the quantities indicated in the original contract after the government knows of its changed requirements.[100]

Quantities mentioned in a contract for a definite amount are important to both parties where the contract is for the purchase or sale of "approximate" or "estimated" amounts. In such contracts there is an implied warranty that the approximate or estimated amounts are reasonably accurate.[101] The meaning of the word "approximately" in this context is dependent upon the type of contract involved and the reliance which a reasonably intelligent bidder would place on the figure in the circumstances.[102] It is expected to indicate only minor and insignificant variations from the stated amount.[103]

Although, not of great importance, both of these concepts of implied warranty are viable and are available to contractors where the government's agents have failed to discharge their duties properly. Recovery under these concepts can be prevented by

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[100] Walters v. United States, 130 F. Supp. 360 (Ct. Cl. 1955), and Gemsco, Inc. v. United States, 115 Ct. Cl. 209 (1950).

[101] *E.g.*, Everette Plywood and Door Corp. v. United States, 419 F.2d 425 (Ct. Cl. 1969), Womack v. United States, 389 F.2d 793 (Ct. Cl. 1968), E. Service Management Co. v. United States, 363 F.2d 729 (4th Cir. 1966). *See* Quiller Constr. Co., Inc., ASBCA No. 8501, 9 Jul. 1963, 1963 B.C.A. para. 3800 at p. 18923, where the board implies that the government warrants that the quantity figures contained in its contract documents are based on fairly accurate estimates or measurements of some acceptable type.

[102] E. Services Management Co. v. United States, 363 F.2d 729, 731 (4th Cir. 1966).

[103] Moore v. United States, 196 U.S. 157 (1904).

accurate estimates and prompt disclosure when changes in requirements become known.

F. *DESIGNATED TRANSPORTATION PROVISIONS IN SUPPLY CONTRACTS*

In *Startex Mills* the USAREUR Board of Contract Appeals found an implied warranty that the government would not hinder or interfere with the contractor. The board then held the government liable for loss of goods after delivery by the contractor to Brooklyn Army Terminal as directed in a contract which specified that title would not pass until inspection and acceptance at final destination in Germany.[104] The general rule is that when a purchaser directs delivery of goods for his account to a designated carrier, the carrier becomes his agent. Title and risk of loss pass to the purchaser upon delivery to that carrier unless the contract clearly provides that the goods remain at the risk of the seller until arrival at the ultimate destination.[105] Clearly in the Startex case, the Army terminal and subsequent carriers were agents of the purchaser. Just as clearly the contract provided that title was not to pass to the government until acceptance at final destination. The contractor had in fact completed delivery and lost all control of the goods upon their arrival and acceptance for shipment at the Army terminal. He was forced thereafter to rely upon the government's agents to protect and deliver them. Despite the risk of loss provision, the board held it would be inequitable to force the contractor to assume the risk when he had no ability to protect himself.

Reliance upon the theory of implied warranty in such circumstances prevents imposition of an unconscionable burden upon the helpless contractor and is consistent with its application to preserve basic fairness in other cases. The complete loss of dominion and control is important to this conclusion. Had the contract designated a particular mode of transportation or even a particular commercial carrier, the contractor could have exercised some measure of control over his goods. Requiring him to assume the risk of loss would have been reasonable. In such a case reliance upon an implied warranty for recovery would have little chance of success in view of the long established rule mentioned above. Accordingly, it is unlikely that *Startex* will be extended beyond its particular facts.

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[104] Startex Mills, USAREUR BCA No. 310, 16 Sep. 1965.

[105] Louisville & N. R. Co. v. United States, 267 U.S. 395 (1925), and United States v. Andrews & Co., 207 U.S. 229 (1907).

III. FORUM, RECOVERY AND PROOF

Breach of contract actions not arising under a specific clause of the contract must be brought in either the United States Court of Claims or a United States district court. Since by definition no specific clause relates to implied warranties, it would appear that these courts, rather than the boards of contract appeals, would have jurisdiction. In fact, however, the boards have often been willing to take jurisdiction by finding that the factual basis for the warranty is within a specific clause bringing the claim under the disputes procedure.[106] For example, the changes clause[107] serves as a vehicle for claims arising from inspection standards more rigorous than those provided in the contract,[108] delays caused by the government's failure to correct errors in drawings after they are brought to its attention,[109] and detailed specifications which do not result in a satisfactory product when followed.[110] Recovery for unreasonable delays causing a breach of implied warranty may be had under the suspension of work clause.[111] Implied warranty claims arising from variances between actual subsurface conditions and government supplied information are settled under the differing site conditions clause.[112]

The relief afforded under the contract clauses includes all the costs incurred by the contractor as a result of the breach of warranty.[113] Recovery is allowed for costs incurred in trying to perform under defective specifications without regard to the time at which these costs accrued, for costs of performing under changed specifications[114] and for costs of reengineering and rede-

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[106] Grenco Services, Inc., NASA BCA No. 67-27, 23 Jun. 1969, 69-2 B.C.A. para. 7789, and L. L. Hall Constr. Co., ASBCA No. 6961, 17 May 1961, 61-1 B.C.A. para. 3044.

[107] ASPR §§ 7.103-2 (Rev. No. 1, 31 Mar. 1969), and 7.602-3 (Rev. No. 1, 31 Mar. 1969).

[108] Emerson-Sack-Warner Corp., NASA BCA No. 9164, 8 Oct. 1964, 1964 B.C.A. para. 4483.

[109] J. W. Hurst & Son, Awnings Inc., ASBCA No. 4167, 20 Feb. 1959, 59-1 B.C.A. para. 2095.

[110] L.&O. Research and Development Corp., ASBCA No. 3060, 15 Nov. 1957, 57-2 B.C.A. para. 1514.

[111] ASPR § 7.602-46 (Rev. No. 1, 31 Mar. 1969). *See* Grenco Services, Inc., NASA BCA No. 67-27, 23 Jun. 1969, 69-2 B.C.A. para. 7789.

[112] ASPR § 7.602-4 (Rev. No. 1, 31 Mar. 1969) (formerly changed conditions). Jefferson Constr. Co. v. United States, 392 F.2d 1006 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 842 (1968).

[113] J. L. Simmons Co., Inc. v. United States, 412 F.2d 1360 (Ct. Cl. 1969), and L.&O. Research and Dev. Corp., ASBCA No. 3060, 15 Nov. 1957, 57-2 B.C.A. para. 1514.

[114] *Id.*

sign to correct deficiencies.[115] Where the appropriate clauses are not included in the contract to allow the board to compensate for all such items, the Court of Claims will allow recovery for those uncompensated items in an equitable adjustment.[116] However, where the board has included all items of cost caused by the breach of implied warranty in the equitable adjustment awarded, the contractor cannot recover additional compensation in the Court of Claims merely by denominating his claim a breach of implied warranty.[117]

To support recovery the contractor must establish by a preponderance of the evidence that circumstances giving rise to an implied warranty exist and that the government failed to meet its obligations thereunder.[118] Once a prima facie case has been established the burden of going forward shifts to the government.[119] The greatest difficulties in application of these established principles exist in cases of implied warranties of adequacy of specifications. In cases involving either detailed or performance specifications the contractor need not show that performance was absolutely or legally impossible; he need only show that it was not reasonably possible.[120] The standard of reasonableness is commercial practicability under the circumstances of the contract.[121] In determining what is commercially impracticable, the courts and boards have considered what was contemplated by the parties at the time of execution of the contract and the relationship of costs of performance to contract price and anticipated profits.[122] A contract is commercially impractical if it results in performance costs substantially above those anticipated due to unanticipated re-

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[115] Tandy and Allen Constr. Co., Inc., ASBCA No. 12486, 25 Feb. 1969, 69–1 B.C.A. para. 7536.

[116] J. L. Simmons Co., Inc. v. United States, 412 F.2d 1360 (Ct. Cl. 1969), and J G. Watts Constr. Co. v. United States, 355 F.2d 573 (Ct. Cl. 1966), and Grenco Services, Inc., NASA BCA No. 67–27, 23 Jun. 1969, 69–2 B.C.A. para. 7789.

[117] Jefferson Constr. Co. v. United States, 392 F.2d 1006 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 842 (1968).

[118] *See, e.g.*, Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965), and ITT Kellogg, ASBCA No. 9580, 7 Sep. 1965, 65–2 B.C.A. para. 5077.

[119] *E.g.*, E. L. Cournand and Co., Inc., ASBCA No. 2955, 29 Sep. 1960, 60–2 B.C.A. para. 2840.

[120] *E.g.*, Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1966), and Globe Crayon Corp., ASBCA No. 1496, 11 Jun. 1954.

[121] *See, e.g.*, Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967), Indus. Electronics Hardware Corp., ASBCA No. 10201 and 11364, 6 Aug. 1968, 68–2 B.C.A. para. 7174, Globe Crayon Corp., ASBCA No. 1496, 11 Jun. 1954.

[122] *See* pp. 41–51, *supra*.

search and development,[123] additional effort required to perform a required process,[124] or a complete change of a normal method of operation which was expected to result in a satisfactory product.[125] Failure to achieve an expected level of profit on the contract is not itself sufficient.[126]

In the past under an objective standard of commercial impracticability claims have been defeated by a showing that other contractors have found performance commercially practicable under similar contracts.[127] Although this objective standard appears more appropriate than one based exclusively on the claimant's ability to perform, at least one board has allowed recovery based on a showing that a process required by the contract did not work as expected for the claimant.[128] This amounts to making the government a guarantor that a contractor will be effective and efficient in the accomplishment of his contracts. There is no indication that this approach will gain further adherents among the courts and boards. Application of such a subjective standard was disapproved by the Court of Claims in *Natus Corp. v. United States*.[129] It is probable that the objective standard of commercial impracticability will be applied by the courts and boards in future cases.

A contractor can recover all of his costs resulting from the government's breach of an implied warranty before the boards when the contract contains appropriate clauses and before the courts in other cases. He has the burden of establishing his right to recover. In defective specification cases this may be done by establishing either legal impossibility or commercial impracticability under an objective standard.

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[123] Clark Grave Vault Co. v. United States, 371 F.2d 459 (Ct. Cl. 1967), and Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967).

[124] *E.g.*, Maxwell Electronics Corp., ASBCA Nos. 8261 and 8413, 14 Oct. 1963, 1963 B.C.A. para. 3916.

[125] *E.g.*, Coe Constr., Inc., IBCA No. 632–4–67 and 687–11–67, 28 May 1969, 69–1 B.C.A. para. 7687.

[126] *E.g.*, Globe Crayon Corp., ASBCA No. 1496, 11 Jun. 1954.

[127] *E.g.*, Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967), and Photron Instrument Co., ASBCA No. 6231, 27 Mar. 1961, 61–1 B.C.A. para. 2983.

[128] Coe Constr., Inc., IBCA Nos. 632–4–7 and 687–11–67, 28 May 1969, 69–1 B.C.A. para. 7687. The board in this case specifically stated that there was no requirement for establishing that a specified process was or would have been commercially impracticable for other contractors as a prerequisite to finding a breach of implied warranty of adequacy of the specifications.

[129] 371 F.2d 450 (Ct. Cl. 1967).

IV. IMPLIED WARRANTY VS. IMPOSSIBILITY, MUTUAL MISTAKE AND MISREPRESENTATION

The theory of implied warranty has been expanded by the boards and courts and is now of considerable importance in the allocation of costs in the types of cases discussed previously. Its application in supply and construction contracts is the same when similar types of situations are encountered. For example, in construction contracts, drawings and specifications are nearly always detailed. Thus the implied warranty of adequacy of detailed specifications is often found in cases involving such contracts. When detailed specifications are found in supply contracts the courts and boards follow the same line of reasoning and find implied warranties of adequacy of specifications.[130] It is apparent that the theory is invoked in an effort to achieve "basic fairness" in the allocation of unexpected costs incurred by the contractor. Regardless of the type of contract involved, when a breach of implied warranty is found, the courts invariably examine the facts and find (1) that a duty not specifically stated in the contract exists on the part of the government which has not been discharged and (2) that the government's failure has caused an unexpected burden to the contractor. Recovery for all costs incurred has been allowed under both construction and supply contracts regardless of the specific nature of the costs.[131]

The theories of "mutual mistake," "misrepresentation" and "impossibility" are also used to allocate unexpected costs on an equitable basis in government contracts. Initially, impossibility was found to exist only when the performance was absolutely impossible.[132] This was termed legal impossibility. Currently, however, the contractor can recover for unexpected cost on the theory of impossibility by showing that the performance required by the contract is commercially impracticable because of conditions which existed at the date of contracting.[133] Once such a showing is made the court must determine which party has assumed the risk of impossibility. That party will then be required to bear the loss.[134]

Impossibility is applied to cases involving detailed specifications which do not result in satisfactory performance and to those

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[130] *See* cases cited in notes 27–55 *supra*.
[131] *E.g.*, cases cited in notes 113–116 *supra*.
[132] *E.g.*, Beebe v. Johnson, 19 Wend. (N.Y.) 500 (1838).
[133] *E.g.*, Globe Crayon Corp., ASBCA No. 1496, 11 Jun. 1954.
[134] Electro-Nuclear Lab., Inc., ASBCA No. 9863, 10 Feb. 1965, 65–1 B.C.A. para. 4682.

where performance specifications require commercially impracticable performance.[135] As discussed earlier, implied warranty has been a basis for allocation of unexpected costs in this type of case. In fact, the language of impossibility and implied warranty often appear commingled.[136] Under both theories, the courts and boards look at all the circumstances to determine whether the government has failed to fulfill duties which the contract does not fairly place on the contractor. Where it has failed in this respect either a breach of implied warranty or impossibility will be found. Finding that the duty remains on the government is implicit in the determination that there is an implied warranty. Commercial impracticability is the standard applied under both theories to determine if the government has failed to provide adequate specifications. It appears that application of the theory of implied warranty in any individual case would lead to the same result as that reached under the impossibility theory.

Recently contractors' efforts to recover on the theory of implied warranty appear to have been more successful than those based on impossibility. Perhaps this is because the word impossibility still carries with it connotations of its earlier meaning, absolute impossibility, and as a result a higher standard of commercial impracticability is applied. From the previous discussion in section II it is evident that the theory of implied warranty is broader than impossibility, which applies only in defective specification cases.

The theory of misrepresentation allows recovery by a contractor for costs incurred in reliance on an erroneous representation of the government. To recover, the contractor must show that the erroneous representation was made, that he justifiably relied thereon, and that as a result he was misled and thereby injured.[137] Such misrepresentations may consist of positive misstatements of fact or failures to disclose pertinent information.[138] The majority of cases involving misrepresentation arise from site conditions which differ from those reflected in the specifications. The theory of implied warranty of adequacy of specifications can be successfully invoked by a contractor only when the specifications contain errors or fail to dislose pertinent information. Where neither of these factors are present, the specifications would always be adequate.

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[135] *See* Bruner, *Impossibility of Performance in the Law of Government Contracts*, 9 A.F. JAG L. REV. 6 (1967).

[136] *E.g.*, Electro-Nuclear Lab., Inc., ASBCA No. 9863, 10 Feb. 1965, 65–1 B.C.A. para. 4682.

[137] *E.g.*, Womack v. United States, 389 F.2d 793 (Ct. Cl. 1968).

[138] Helene Curtis Inc. v. United States, 312 F.2d 774 (Ct. Cl. 1963).

Although the concept that fault on the part of the government is necessary to enable recovery was once a part of the theory of misrepresentation, that is no longer required and recovery will be allowed for injury due to inadvertent misrepresentations.[139] Perhaps one qualification to this general statement is that the contractor must establish that the government had actual or constructive knowledge of his need for information which was not disclosed.[140]

It appears that application of the theory of misrepresentation will lead to the same result as the theory of implied warranty of adequacy of drawing and specifiiations. As noted earlier, specifications are adequate unless they omit information or contain errors. These are the only circumstances in which the theory of misrepresentation is applied. The right to recover for misrepresentation exists because of the error, not the fault in making it. The same is true where an implied warranty is found in defective specification cases. The government's knowledge of the contractor's need for information, a prerequisite to recovery for misrepresentation based on failure to disclose information, is very likely an element that the court would consider in determining the existence of an implied warranty.

Mutual mistake is an equitable theory which may allow reformation of a contract when the parties are shown to have been mutually mistaken about a significant material fact at the time of contracting. As originally applied, the theory operated only as a defense to actions for nonperformance. It has now become, in addition, a means for recovery of costs for completed work. The Court of Claims has incorporated limitations into this theory, to recover, the contractor must establish that a mutual mistake existed on the date of contracting, that the contract did not specifically allocate the risk of the increased cost resulting from the mistake to the contractor, that the government received a benefit from the extra work done as a result of the mistake, and that the government would have agreed to pay a greater price had it known the true facts.[141] Relief has been denied on the specific grounds of a contractor's failure to show that the government would have agreed to pay a higher price had it known the true facts.[142]

Mutual mistake cases arise out of circumstances where the specifications provide for a particular performance and both parties

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139 Womack v. United States, 389 F.2d 793 (Ct. Cl. 1968).
140 J. A. Jones Constr. Co. v. United States, 390 F.2d 886 (Ct. Cl. 1968).
141 National Presto Ind., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964).
142 Evans Reamer & Mach. Co. v. United States, 386 F.2d 873 (Ct. Cl. 1967).

believe this to be attainable at a reasonable cost by following the specifications, but it is not so attainable. The reason may be either that the costs exceed those expected or detailed specifications do not result in adequate performance as a result of factual conditions which vary from those believed by both parties to exist at the time of contracting. As indicated in earlier discussion, this is a type of situation in which the theory of implied warranty is often applied. The theory of impossibility, also applied in similar situations, is recognized by the Restatement of Contracts as essentially a species of mutual mistake.[143] Under a theory of implied warranty, as under mutual mistake, recovery for excess costs is denied when the risk is specifically allocated to the contractor.[144] However, the additional conditions of recovery, government benefit and government willingness to pay a higher price, imposed when proceeding under the theory of mutual mistake are not a part of the law relating to implied warranty. Thus relief will often be available under the theory of implied warranty when it is not under the theory of mutual mistake.

It is probable that mutual mistake will not occupy a position of any great importance in government contract law in the future. It will in fact probably fall into complete disuse as contractors frame their claims in the language of implied warranty under which recovery is more readily available.

Mutual mistake, misrepresentation and impossibility are currently viable theories for recovery in the law of government contracts. It appears, however, that the widely recognized theory of implied warranty would be at least equally advantageous to a contractor for any claim he might frame in the language of any of these theories. Simplification and consistency of government contract law would be aided and the goal of basic fairness approached by employment by the courts and boards of the theory of implied warranty in deciding such claims in the future. Such course of action would avoid the inconsistent treatment of similar factual situations merely because a claim is phrased in terms of a different theory of recovery.

V. STANDARD CONTRACT PROVISIONS AND IMPLIED WARRANTY

As discussed earlier the boards of contract appeal are only authorized to award relief under the theory of implied warranty when they determine that the factual circumstances are within

[143] RESTATEMENT OF CONTRACTS, § 456, Comment d.

[144] *See* pp. 69–71, *infra*.

one of the contract clauses thus giving rise to a dispute under the contract. The disputes procedure was developed to afford an adequate administrative remedy for contractor complaints. Although the boards have not hesitated to give relief for claims arising under the theory of implied warranty, this has often led to a strained construction of the contracts, particularly the changes clause. This clause is the contract provision most often used by the boards as a vehicle to award relief for breach of implied warranty. The boards have proceeded on the reasoning that the act of the government which constituted the breach of implied warranty has caused a "constructive change" for which an equitable adjustment is properly made under the changes clause.[145] This is not difficult to justify when the act complained of occurred after award of the contract and during performance, for example where the government agents applied inspection standards more stringent than those contained in the specifications or where the government's agents directly interfered with the contractor's performance. However, when the breach of implied warranty is based on the issuance of defective detailed drawings and specifications or specifications which require commercially impracticable performance, no act occurs during the contract which can be construed as constituting an "order" under the changes clause. The contracting officer's direction to proceed using defective specifications has been held to be such an order.[146] The issuance of the drawings and specifications presumably could be the "order" constituting the change, although the boards have not discussed this in their opinions. These legal fictions are unsatisfactory as a means of deciding such claims.

The government could add certainty to its contracts by including wording excluding recovery on the grounds of breach of implied warranty. One means of attempting this would be the inclusion of a general exculpatory provision assigning to the contractor any risk not specifically allocated to the government. However, general exculpatory provisions of this type have not been successful in the past to preclude recovery by a contractor for breach of implied warranty.[147]

Recently the Comptroller General, in denying a protest by Fermont Division, Dynamics Corporation of America, upheld the

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[145] *E.g.*, F. J. Stokes Corp., ASBCA No. 6532, 11 Sep. 1962, 1963 B.C.A. para. 3944.

[146] *Id.*

[147] *E.g.*, United States v. Spearin, 248 U.S. 132 (1918), and Morrison-Knudsen Co. v. United States, 184 Ct. Cl. 661 (1968).

award of a negotiated contract which included a detailed provision placing on the contractor the risk of any "discrepancy, error, or deficiency in design or technical data" in government furnished detailed drawings and specifications.[148] The contracting officer's determinations and findings noted that there was a need for change of the specifications and development of the equipment to achieve satisfactory performance. The contractor was advised of this. The contract required that the contractor make a detailed review of the drawings and specifications. The contractor was authorized to include a payment item for all costs he expected to incur as a result of research and development or other expenditures to correct the drawings and specifications. All such costs not anticipated and included in the contract price were specifically excluded. The Comptroller General assumed that this provision would be effective.

Specific exculpatory language and actions which clearly reflect that the government is limiting its liability for defective specifications have been held effective to preclude the existence of a warranty that detailed specifications are adequate.[149] Such provisions have been effective only when they were narrow in scope. As they become broader in application the courts and boards consider them general in nature and hold that they are ineffective.[150] The courts and boards have not yet decided a case involving a contract containing a provision as broad in scope and explicit in assigning risk to the contractor as that approved by the Comptroller General in the *Fermont* protest. However, the *Fermont* provision is much more explicit in placing the risk of defects in the drawings and specifications on the contractor than the general exculpatory provisions which have been construed by the courts. It is also limited to defects in the specifications and drawings. It is probable that the courts and boards will give effect to explicit allocation of risk provisions such as this to preclude recovery under the theory of implied warranty, at least in cases where the government and contractor are aware that further development will be required to achieve satisfactory performance. Because of the purpose—to achieve basic fairness—of the theory of implied warranty, it is

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[148] 58 Comp. Gen. 750 (1969); 277 F.C.R. D–1 and Ms. Comp. Gen B–165953, 27 Oct. 1969, 299 F.C.R. A–2.

[149] *E.g.*, Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965), and Bethlehem Steel Co., ASBCA No. 10058, 17 May 1965, 65–2 B.C.A. para. 4869.

[150] *See, e.g.*, Morrison-Knudsen Co. v. United States, 184 Ct. Cl. 661 (1968), United Contractors v. United States, 368 F.2d 585 (Ct. Cl. 1966), and Flippin Materials Co. v. United States, 312 F.2d 408 (Ct. Cl. 1963).

probable that exculpatory provisions will be effective to limit implied warranties only in those situations where the contractor is able at the time of contracting to determine with reasonable accuracy the probable costs of the risks shifted to him by the exculpatory provisions. Such provisions would probably not be effective to defeat implied warranties of noninterference and assistance in appropriate cases.

Utilization of exculpatory clauses on a large scale to avoid the risks usually allocated to the government would be contrary to the policy of close pricing as it would lead to inflated bids by contractors. It would probably be less costly in the long run for the government to assume such risks. The certainty of cost introduced by inclusion of such exculpatory provisions would be outweighed by the disadvantage of this anticipated higher cost.

Another alternative is modification of the standard changes clauses[151] to provide for straightforward evaluation of claims based upon breach of implied warranty without the need to resort to the fictions employed in the past. Recently the standard changes clause for construction contracts was modified to explicitly include several situations in which the courts and boards had previously awarded recovery on the basis of constructive change.[152] Under this new changes clause the contractor may treat any written or oral order from the contracting officer as a change and must give notice to the contracting officer that he intends to treat it as such as a prerequisite to recovery for additional costs incurred as a result of the order. The new clause also provides for recovery of costs incurred as a result of defective specifications without the requirement of notice to the contracting officer. The notice provision is important because it enables the government to begin accumulating facts at the time the work is in progress. This should provide more complete information on which to base a settlement. In the past the claim of breach of implied warranty was often made only at the completion of the contract. Whether the provision excluding any other "order, statement or conduct of the Contracting Officer" from treatment as a change and from consideration for equitable adjustment will be effective to preclude administrative recovery on the theory of implied warranty remains for decision. This is not of great significance, however, as most of the

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[151] ASPR §§ 7.103–2 (Rev. No. 1, 31 Mar. 1969), & 7.602–3 (Rev. No. 1, 31 Mar. 1969).

[152] This modification of ASPR § 7.602–3 (Rev. No. 1, 31 Mar. 1969) became effective 1 February 1968.

situations which have given rise to implied warranties in the past are now specifically included in the standard clause.

Similar modification of the standard changes clause for supply contracts,[153] to treat as changes factual situations in which the theory of implied warranty has been applied in the past, seems feasible. In reality, it would only be a recognition of present law allowing recovery by a contractor and would provide a basis for straightforward reasoning by the boards. A notice provision would be an advantage to the government as mentioned above.

VI. CONCLUSION

The theory of implied warranty is firmly established in the law of government contracts. Its significance increased with the magnitude of the government's procurement and the complexity of technological development. This trend has probably been reversed and implied warranties nearly eliminated in construction contracts by the 1968 modification to the standard changes clause. The trend can be expected to continue in supply contracts unless there is a similar modification of the standard changes clause or explicit exculpatory provisions are included in such contracts. The boards of contract appeals have successfully established means of according full and complete relief in an equitable adjustment under the existing standard contract clause in supply contracts through the disputes procedure. In the few cases where clauses, which can serve to bring the situations within the disputes procedure are not contained in the contract, common law damages are available to the contractor in the courts only if the government does not act to terminate the contract for convenience. If the government takes such action, which apparently is its absolute right at any time, recovery will be limited to an administrative equitable adjustment.

The theories of mutual mistake, impossibility and misrepresentation seem to add little to the theory of implied warranty in the law of government contracts. Their use as a theory of recovery is likely to decline in favor of a wider application of the theory of implied warranty. When cases are submitted on these theories the courts and boards can avoid varying results in similar factual circumstances by applying the theory of implied warranty. This will result in a more equitable resolution of such disputes.

Exculpatory provisions, if sufficiently specific and explicit, are effective to allocate risk to the contractor. However, this is not a

[153] ASPR § 7.103–2 (Rev. No. 1, 31 Mar. 1969).

satisfactory method to eliminate implied warranties because of the increase in bid prices that can be expected. The recent modification of the standard changes clause for construction contracts will do much to provide for straightforward reasoning allowing administrative recovery and to eliminate an undesirable element of surprise and unexpected increase in costs at the end of the contract to the government in implied warranty situations. The same result could be achieved by modification of the standard changes clause for supply contracts. These modifications are probably the best method available to provide adequate administrative recovery to the contractor and to limit the use of the theory of implied warranty in government contract law.

STANDING TO SUE LEAVES THE ARMY STANDING WHERE?*

By Captain Morris J. Lent. Jr.**

In the past year and a half, the courts have rewritten much of the law concerning standing to challenge government procurement awards. The author examines the erosion and fall of the "no standing to sue" doctrine culminating in the 1970 decision in the Scanwell case. He then studies the initial judicial interpretation of the Scanwell decision. In the concluding section, he suggests that neither legal precedent nor sound public policy justifies judicial intervention in government contracting procedures.

This article will focus on the problems which result when an unsuccessful bidder[1] on a government contract attempts to redress an alleged wrong. The wrong may take one of several forms. For example, in formally advertised contracts, the unsuccessful bidder may be the low bidder who feels that he has unjustifiably been held non-responsive;[2] it may be the second lowest bidder who feels the lowest bidder should have been held non-responsive[3] or not responsible.[4] In negotiated contracts, where the contracting officer has even wider discretion, the potential litigant may be one who feels that he would have been awarded the contract had this dis-

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1 To be more precise, this sentence should read "potential" as well as "unsuccessful" bidder. For in a recent case, Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), the court granted standing to a contractor who complained that he had been foreclosed from having an opportunity to bid. For a discussion of just how far standing might be extended, see Section IV.A. *infra*.

2 Schoonmaker Co. v. Resor, 319 F. Supp. 933 (D.C.D.C. 1970).

3 Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

4 Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968).

cretion not been abused.[5] In effect, the disappointed bidder is stating that his rights have been violated because a government agency failed to properly interpret and apply procurement law and regulations.

Until very recently, the only avenue of complaint for this unsuccessful bidder was to file a protest with the General Accounting Office.[6] He could not go into court because it had traditionally been held that he had no standing to sue.[7] On February 13, 1970, the Court of Appeals for the District of Columbia literally turned the government contract world upside down when it ruled in *Scanwell Laboratories Inc. v. Shaffer*[8] that an unsuccessful bidder did have the needed standing to sue the Government.

This article will analyze this new position to determine if it will and should become a fixed part of our law. The article will trace the historical background of the standing question, discuss recent decisions and project on future decisions, and consider what the law ought to be with suggestions of how to achieve that end.

I. HISTORICAL BACKGROUND

Although discussion of standing is found in earlier decisions,[9] the classic case in this area is *Perkins v. Lukens Steel Co.*[10] Plaintiffs were potential government contractors who disagreed with a minimum wage determination made by the Secretary of Labor. The Public Contracts Act of 1936 authorized the Secretary to determine the prevailing minimum wage in a locality. Any contractor who did not pay this minimum wage was estopped from dealing with the government. Plaintiffs argued that the Secretary had construed "locality" to include a larger geographical area than

[5] The cases thus far decided by the courts have concerned due process contentions or misapplication of regulations in formally advertised contracts as opposed to a complaint based on abuse of discretion in a negotiated contract. But it is just a matter of time until the standing issue will arise in this context. The Comptroller General has already, in several instances, taken a close look at supposed discretionary decisions. For example, in 48 COMP. GEN. 605 (1969), he strongly questions the practice of negotiating with only one firm on the basis of accurate prior cost information where the prior procurements were not competitive. For an excellent treatment of this area and the whole standing question, see Pierson, *Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. IND. & COMP. L. REV. 1 (1970) [hereinafter cited as PIERSON].

[6] *See* Section IV.B. *infra* for a brief analysis of this procedure.

[7] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[8] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

[9] *See, e.g.*, Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447 (1923).

[10] 310 U.S. 113 (1940).

the Act contemplated and that they could not effectively compete for government contracts if required to abide by the wage determination. The district court dismissed the suit for lack of jurisdiction. The circuit court decided that plaintiffs' allegations were essentially correct, reversed the decision, and ordered a host of government officials concerned not to abide by the Secretary's determination.[11]

The Supreme Court held that the plaintiffs did not have standing to sue the government .The decision was based on two distinct lines of argument. From a strictly *legal* point of view, the Court said that for parties to have standing, they "must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."[12] In other words, the statutes regulating the contracting procedures of officers of the government are enacted solely for the benefit of the government and confer "no enforceable rights" upon persons dealing with it.[13]

The Court stressed just as strongly the *policy* considerations involved. For example:

> [The Public Contracts] Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers.[14]

In even stronger language:

> It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of government that the administration of purchasing machinery be unhampered.[15]

As indicated above, until *Scanwell*, the reasoning of *Perkins* had generally been followed. However, in the interim, several cases presaged a new direction of thought.

The first case in which the standing issue was decided to any extent in favor of the contractor was *Heyer Products Co. v. United States*.[16] The plaintiff claimed that even though he was the low responsible bidder, the contract was arbitrarily awarded to

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[11] It may be of interest that the circuit court which granted standing in this case was the Court of Appeals for the District of Columbia, the same court which would take a similar position thirty years later in Scanwell.

[12] Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940).

[13] *Id.* at 126.

[14] *Id.* at 127.

[15] *Id.* at 130.

[16] 140 F. Supp. 409 (Ct. Cl. 1956).

another firm. He further alleged that there were six other bids which were lower than the successful bidder and that he was personally discriminated against because of his anti-government testimony before a Senate Committee. Heyer sought both the costs of preparing his bid and the profits he would have made had he gotten the contract. In discussing the claim for anticipatory profits, the Court of Claims indicated that even if the award was not made in accordance with procurement regulations,[17] "[I]t is only the public who has cause for complaint, and not an unsuccessful bidder."[18] But in speaking of the costs of bid preparation, the court announced that the bidder did have certain rights and that one of these rights was to have his bid honestly considered. The opinion then defined the government action that would be violative of this right.

> Recovery can be had only in those cases where it can be shown by clear and convincing proof that there has been a fraudulent inducement for bids, with the intention, before the bids were invited or later conceived, to disregard them all except the ones from bidders to one of whom it was intended to let the contract, whether he was the lowest responsible bidder or not.[19]

Utilizing this standard three years later the Court of Claims decided that Heyer was not entitled to recover anything.[20]

The next erosion of *Perkins* occurred in *George v. Mitchell*.[21] At the heart of the dispute was the Walsh-Healy Act under which the Secretary of Labor acted in *Perkins*. The Act states the general principle that the Federal Government should procure and use only those goods produced under safe and fair working conditions. Plaintiff sought a declaratory judgment that the contracts he had made with the Atomic Energy Commission were not within the purview of the Act. He further sought to enjoin the Secretary of Labor from blacklisting him for violations of the Act.[22]

The initial issue in the case was whether the contractors had standing to sue. This question was different than the one faced by the *Perkins* Court because, in 1952, Congress had enacted the

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[17] The provision in question is found in Armed Services Procurement Reg. § 2–407–1 (1 Jan. 1969). It reads: "Unless all bids are rejected, award shall be made by the contracting officer, within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the invitations for bids, will be most advantageous to the Government, price and other factors considered."

[18] Heyer Products Co. v. United States, 140 F. Supp. 409, 412 (Ct. Cl. 1956).

[19] *Id.* at 414.

[20] Heyer Products Co. v. United States, 177 F. Supp. 251 (Ct. Cl. 1959).

[21] 282 F.2d 486 (D.C. Cir. 1960).

[22] The term is commonly used to mean placing a contractor's name on a list of persons ineligible to be awarded government contracts.

Fulbright Amendment to the Walsh-Healy Act. The pertinent portion of this amendment states: "[A]ny interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality', 'regular dealer', 'manufacturer', and 'open market'."[23] The government's contention that plaintiffs lacked standing was based on the interpretation that the amendment applied only if the Attorney General brought an enforcement proceeding. The court disagreed, citing legislative history indicating the rights could be claimed in "any appropriate proceeding".[24]

In this regard, the court stated:

> The legislative history of the Fulbright Amendment evidences a multiplicity of Congressional purposes, including an intent (1) to overrule the *Lukens* case insofar as it pertained to the Walsh-Healy Act. . . .[25]

However, nowhere did the court indicate that the scope of the standing granted was any broader than this.

Less than one year later, the same court, the United States Court of Appeals for the District of Columbia, decided *Copper Plumbing and Heating Co. v. Campbell.*[26] In this case, the plaintiff had been engaged in a significant amount of subcontracting on government contracts. In this capacity, he had violated the Eight Hour Laws by failing to pay time and a half for overtime. For this violation, the plaintiff paid the overtime due as well as a $955 fine. In accordance with regulations, he was barred from doing business with the United States for three years. Plaintiff then sought a declaratory judgment that the regulation under which he was disbarred was unlawful.

Again, the pertinent issue was whether or not the contractor had standing to bring such a suit. The court distinguished the case from *Perkins* and held that he did have standing. They cited the *Perkins* language indicating that for plaintiffs to have standing, they must show an injury unique to themselves. The court then pointed out that, in *Perkins*, the wage rates in question applied to all other manufacturers in the industry; but that here, only the right of one contractor not to be disbarred was in question. The court then stated:

> While they do not have a right to contract with the United States on their own terms, appellants do have a right not to be invalidly

[23] 41 U.S.C. § 43a(c) (1964).
[24] George v. Mitchell, 282 F.2d 486, 490 (D.C. Cir. 1960).
[25] *Id.* at 489.
[26] 290 F.2d 368 (D.C. Cir. 1961).

> denied equal opportunity under applicable law to seek contracts on government projects.[27]

And then without further elaboration, the court cited *George v. Mitchell* and said:

> If deprived of this right they suffer a "legal wrong" which gives them access to the courts under section 10 of the Administrative Procedure Act.[28]

Significantly the Administrative Procedure Act had not been mentioned in *George*. The only legislation mentioned in that case was the Walsh-Healy Act.

An explanation of the role of the Administrative Procedure Act was given by Judge (now Chief Justice) Burger in *Gonzalez v. Freeman*.[29] There the plaintiff was disbarred for five years from doing any more business with the Commodity Credit Corporation. The alleged reason for this penalty was a misuse of inspection certificates by Gonzalez. Gonzalez claimed that he was disbarred without due process of law. In particular, he alleged the grounds for the disbarment were not sufficiently specified and that he did not have sufficient opportunity to meet the charges.

The court restated the *Perkins* position that "[N]o citizen has a 'right', in the sense of a legal right, to do business with the government."[30] But the court also said:

> Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.[31]

Citing *Copper Plumbing*, the court held even though there is no right to government contracts, the government cannot act arbitrarily. Here the alleged injury was the result of an arbitrary procedure and the plaintiffs were entitled to a forum to attempt to redress this grievance.

In a separate paragraph entitled "Judicial Review", the court discussed the Administrative Procedure Act. It indicated that "[S]ection 10 [of the Act] withholds from judicial scrutiny cases where '(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.' "[32] The government contended that the challenged action fell within both these categories. This contention was based on a statute which said:

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[27] Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370–71 (D.C. Cir. 1961).
[28] *Id.* at 371.
[29] 334 F.2d 570 (D.C. Cir. 1964).
[30] *Id.* at 574.
[31] *Id.*
[32] *Id.* at 575.

> Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation, Charter Act.[33]

Rejecting this argument, the court said that before action could be immune from judicial review there must be "the plainest manifestation of congressional intent to that effect."[34] Seeming to strain a bit, the court continued that Congress, in passing this statute, "must have contemplated that a claim of 'inconsistency' in the Secretary's action was to be resolved by judicial review."[35] In regard to the second prohibition of Section 10, the opinion interpreted the statute to read that only determinations concerned with "operational policy decisions and programs of the agency," and not "standards of procedures for disbarment" were meant to be "final and conclusive".[36] Also, as in *Copper Plumbing*, the court distinguished *Perkins* by pointing out that appellants were attacking not a broad policy decision but an action which inflicted a special injury on them.[37] Finally, with a big swoop, the court said judicial review was authorized by Section 10(a), 10)(b) or 10(c) of the Administrative Procedure Act.[38]

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[33] 7 U.S.C. § 1429 (1958) (emphasis supplied).

[34] Gonzalez v. Freeman, 334 F.2d 570, 575 (D.C. Cir. 1964).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–04 (Supp. IV 1968), read as follows:

"5 U.S.C. § 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law . . . .

"5 U.S.C. § 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

"5 U.S.C. § 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

"5 U.S.C. § 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any

Next, the Supreme Court, opinion in *Flast v. Cohen*[39] deserves passing attention. Appellants complained that federal funds, made up of their tax dollars, were being used to support religious schools in violation of the Establishment and Free Exercise Clauses of the First Amendment. They based their standing to sue solely on their status as federal taxpayers. The Court upheld their right to bring the suit, but limited the decision to its constitutional context.

> Consequently, we hold that a taxpaper will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is a derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.[40]

In *Lind v. Staats*,[41] the standing issue was again squarely faced. The low bidders complained that government officers had abused their discretion by failing to properly determine that they were responsible and their bid was the one which would be most advantageous to the Government.[42]

A preliminary injunction restraining any further action on this contract was requested. In support of their contention that they had standing, the appellants cited *Flast* and *Copper Plumbing*. The court answered by limiting *Flast* to its constitutional context and pointing out that *Copper Plumbing* was distinguishable since here, as in *Perkins*, general regulations applicable to all contractors were in issue. The court concluded that a disappointed bidder cannot contest the award of a contract.[43]

The last important case before *Scanwell* was *Superior Oil Co. v. Udall*,[44] another Judge Burger opinion. In this case, the plaintiff and Union Oil, submitted bids to the Department of Interior to purchase an oil lease. Union's bid was the highest but was initially rejected by the contracting officer because it had not been signed, as required by the regulations. Subsequently, the Secretary reversed the decision of the contracting officer and awarded the lease to Union. Superior Oil, the second highest bidder, successfully brought suit in the district court to enjoin the Secretary from

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form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." This language is substantially the same as when enacted in 1946. What is referred to as "Section 10(a)" (reference is to *Statutes at Large*) is § 702, 10(b) is § 703, and 10(c) is § 704.

[39] 392 U.S. 83 (1968.)

[40] *Id.* at 105–06.

[41] 289 F. Supp. 182 (N.D. Cal. 1968).

[42] *See* note 17, *supra*.

[43] Lind v. Staats, 289 F. Supp. 182, 186 (N.D. Cal. 1968).

[44] 409 F.2d 1115 (D.C. Cir. 1969).

taking such action. The injunction was upheld in the Court of Appeals. In analyzing the lower court decision, one commentator noted:

> [T]he court did not indicate whether it agreed with the district court's finding that Superior's bid had been accepted by the contracting officer, whether such evidence was prima facie evidence of a contract upon which Superior could sue for breach, or whether Superior had standing upon some other basis. Whatever the basis, the court did not state that Superior had standing to sue because it was an unsuccessful bidder.[45]

This brief analysis shows that, up through *Superior Oil*, the basic thrust of *Perkins v. Lukens Steel Co.* was not successfully challenged. In the cases just discussed, some of the plaintiffs were accorded standing, but their relief was limited.

> None of these decisions expressly held that unsuccessful bidders have standing to sue, either on their own behalf or on behalf of the public, for cancellation of a government contract not awarded under procedures conforming to those prescribed by the procurement statutes or regulations.[46]

The *Scanwell* opinion does so hold.

II. THE SCANWELL DECISION

The controversy in the case arose over a contract for instrument landing systems. The Federal Aviation Administration's invitation for bids was written so as to exclude any company that did not already have such a system installed and tested. The contract was awarded to Airborne Instruments, as the lowest bidder. However, Airborne Instruments did not have a system operational. Because of this, Scanwell Laboratories, the second lowest bidder, sought to have the award set aside. In its complaint, Scanwell suggested the court could take such action under Section 10(c) of the Administrative Procedure Act.

The district court ruled that Scanwell did not have standing to

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[45] PIERSON, at 10. This case deserves additional comment because the court not only consented to hear plaintiff's arguments on the merits, but actually ordered that an award be made to a certain bidder. Also note that the Scanwell court cited it as support for their opinion.

What makes it imperative, however, to construe the implications of this case narrowly is that involved were public lands and a public lands statute and not government procurement contracts. Indeed, the government, in this case, did not appear to have even made an argument based on Perkins. It is also true that sovereign immunity has historically been treated as a very minor obstacle in public land cases. For a more complete discussion of the distinguishing features of this case, see Brief for Appellant at 30–31, Schoonmaker Co. v. Resor, and Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public Lands Cases*, 68 MICH. L. REV. 867 (1970) [hereinafter cited as SCALIA].

[46] PIERSON, at 11.

bring the suit. The Court of Appeals for the District of Columbia reversed stating the district court has been "mislead by precepts which on careful examination are more rhetorical than guiding."[47]

The court relied on three different theories in granting standing. Each is of dubious validity. The first was that the 1952 Fulbright Amendment to the Walsh-Healy Act demonstrated "that the basic approach of the Supreme Court in the *Perkins* case has been legislatively reversed. . . ."[48] This contention clearly lacks support. Legislative history, commonly accepted rules of statutory construction and subsequent court interpretation indicate the purpose of the amendment was a narrow one. In speaking of the amendment, Senator Fulbright, himself, said, "This amendment accomplishes the major objective of affording judicial review of interpretations of the Walsh-Healy Act by the Secretary of Labor."[49] He continued:

> The Secretary of Labor has decided that the law means a certain thing. I say he is in error about it. . . . All that I am endeavoring to do and all that is intended . . . is to afford a means whereby that question can be decided by the court.[50]

This same issue was discussed in *George v. Mitchell.* There the same court indicated the amendment only overruled *Perkins* insofar as it was pertinent to the Walsh-Healy Act. A common sense interpretation of the text of the amendment indicates that it deals solely with wage matters.[51] As one commentator has said:

> If Congress had intended to reverse the basic approach of *Perkins* and grant standing to unsuccessful bidders, it would have amended Revised Statute 3709 or the more recent procurement statutes enacted in 1947 and 1949 which supplement and, in larger measure, supersede Revised Statute 3709.[52]

In short, there was no "legislative reversal" of *Perkins.*

The second approach was to find that the enactment of the Administrative Procedure Act had greatly modified the law of standing. The court reasoned that the flavor of the Act indicated a policy favoring judicial review of administrative actions. Implicit in their discussion were assumptions concerning the nature of sovereign immunity.

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[47] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 860 (D.C. Cir. 1970).

[48] *Id.* at 867.

[49] 98 CONG. REC. 6529 (1952) (remarks of Senator Fulbright).

[50] *Id.* at 6531.

[51] The pertinent provision of this amendment is 41 U.S.C. § 43(c) (1964): "[A]ny interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality,' 'regular dealer,' 'manufacturer,' and 'open market.'"

[52] PIERSON, at 14.

The doctrine of sovereign immunity protects the United States from being sued without its consent.[53] It is not always clear how the issue of sovereign immunity commingles with the standing question. The situation is further muddled because the courts have not been precise in stating when they are using the Administrative Procedure Act to overcome the sovereign immunity obstacle. Additional confusion stems from the fact that recent opinions, including *Scanwell,* frame the issue not in terms of sovereign immunity, but in terms of whether a dispute is judicially reviewable.[54]

There was no direct discussion of sovereign immunity in *Perkins* although the Court may have had it in mind when it said the Public Contracts Act bestowed no "litigable rights upon those desirous of selling to the Government."[55] Although the term, sovereign immunity, was not used, there seemed to be recognition of the issue in the *George, Copper Plumbing* and *Gonzalez* cases. In *George,* the problem required little discussion as it was clear that the United States could be taken into court; this was the very purpose of the Fulbright Amendment to the Walsh-Healy Act. In *Copper Plumbing* and *Gonzalez,* the court distinguished *Perkins* by pointing out that an injury to a "particular right" of the plaintiff, the right not to be disbarred was involved. Having distinguished these cases, why did the court not proceed directly to grant standing? The reason is that the obstacle of sovereign immunity still had to be overcome. In other words, the court still had to find a rationale for allowing suit to be brought against the United States. The court cited the Administrative Procedure Act as authorization for judicial review in both cases. The extent of the court's discussion in *Copper Plumbing* was a citation to *George*[56] and the statement that the plaintiffs had suffered a "legal wrong" which gave them access to the courts under Section 10 of the Act. The *Gonzalez* court did discuss in greater detail the applicability of the Administrative Procedure Act. Based on this background the *Scanwell* court found that the Administrative Procedure Act had "greatly modified" the law of standing.[57]

The first point of criticism is obvious. If the Act did so modify

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[53] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

[54] *Also see* Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). The questionable implication of this approach is that unless Congress has precluded review, sovereign immunity is no obstacle.

[55] Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

[56] Recall that George did not mention the Administrative Procedure Act.

[57] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 865 (D.C. Cir. 1970).

standing law, it took the courts and contractors fifteen years to discover it. It is certain they did not realize it in 1952 when they passed the Fulbright Amendment to the Walsh-Healy Act. For if the Act embodied the blanket authorization for judicial review attributed to it by the *Scanwell* court, there would have been no need to authorize judicial review in one small area.

The theory that the government waived its right to immunity with the enactment of the Administrative Procedure Act was rejected in *United States ex rel. Brookfield Construction Co. v. Steward.*[58] Appellants attempted to compel the appellee, the architect of the Capitol, to award them a construction contract on which their bid was the lowest. The court refused to take such action on the basis that the appellee's rejection of the bid was within his statutory authority and therefore barred by the doctrine of sovereign immunity.

One commentator pointed out that there has to be a waiver of sovereign immunity in a statute which confers jurisdiction in an area in which the United States is involved. He further stated:

> The Administrative Procedure Act is yet another step removed from a direct waiver of sovereign immunity; not only does it, like the type of statute just discussed, omit any explicit waiver; but it does not even contain any explicit grant of subject matter jurisdiction from which a waiver might be implied.[59]

In *Blackmar v. Guerre*, a suit against the Civil Service Commission, the Supreme Court made the statement: "Still less is the Act [Administrative Procedure Act] to be deemed an implied waiver of all governmental immunity from suit."[60]

If sovereign immunity is not waived, the only other way it can be penetrated is through the use of the well recognized exception that allows parties to bring suits against sovereign officers if they have acted beyond the statutory authority given them.[61] An allegation that an action taken is "wrong" or even "arbitrary" does not meet this test. The *Scanwell* court's third theory was that the

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[58] 339 F.2d 753 (D.C. Cir. 1964).

[59] SCALIA, at 921.

[60] Blackmar v. Guerre, 342 U.S. 512, 516 (1951).

[61] In tracing the history of sovereign immunity, Mr. Justice Vinson made the following comment: "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign . . . where the officer's powers are limited by statute, his actions beyond these limitations are considered individual and not sovereign actions." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). For a more complete discussion of this point, see Recent Cases, *Federal Jurisdiction—Sovereign Immunity—Suits Against Officers of the Federal Government*, 16 VAND. L. REV. 231 (1962).

disappointed bidder was a "private attorney general" suing on behalf of the public. This is an attempt to answer the *Perkins* reasoning that procurement statutes are not for the benefit of individuals. The first problem with this theory is that it assumes it is in the public interest to allow unsuccessful bidders to bring suit.[62] The second problem is that it is an obvious fiction. An unsuccessful bidder like Scanwell could care less about public vindication through forcing rigorous adherence to procurement statutes. He is interested in the financial benefits which accompany the award of the contract.

In fairness to the *Scanwell* court, their decision is supported by precedents in related areas. Several Supreme Court decisions[63] before *Scanwell* indicate that the Court is far more willing to confer standing today than in 1940 when *Perkins* was decided. But it is significant that none of these decisions involved the award of government contracts. And it is this difference which leads to the most significant defect of the *Scanwell* opinion. It did not satisfactorily answer the persuasive argument in *Perkins* that it is not in the public interest to open the government contracts system to attack. This important consideration will be discussed after the decisions subsequent to *Scanwell* are analyzed.

III. POST SCANWELL LITIGATION

In March of 1970, the Supreme Court, in back-to-back decisions,[64] further defined the standards for determining standing. They listed three tests which must be satisfied. First, the plaintiff must allege that "the challenged action has caused him injury in fact, economic or otherwise."[65] This assures that the case will be presented in an adversary context and the "case or controversy" requirement of Article III will be met. Next, the plaintiff's interest must "be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[66] The Court noted that, even if a plaintiff's interest is arguably protected, he will not succeed *on the merits* unless he has the necessary "legal interest."[67] Such an approach will allow more

[62] See discussion of this point in Section IV *infra*.

[63] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Hardin v. Kentucky Utility Co., 390 U.S. 1 (1968); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[64] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[65] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970).

[66] *Id.* at 153.

[67] *Id.*

people to get into court, but does not mean they will prevail.[68] Finally, it must be determined whether the statute involved reflects a congressional intent to foreclose judicial review of administrative actions.[69]

These guidelines seem to indicate the Court, in deciding the issue of standing, has abandoned the traditional requirement of a "legal right" or a statute which specifically confers standing.[70] As with the earlier standing decisions relied on by the Scanwell court[71] these cases do not involve government contract awards.[72] It is by no means certain the Supreme Court will extend this liberalized concept of standing to procurement cases. Nor is it clear, if the concept is applied, that standing will automatically be granted to unsuccessful bidders. Lower court decisions indicate a difference of opinion on both questions.

The first major decision interpreting *Data Processing* was *Ballerina Pen Co. v. Kunzig*.[73] In this case, the Administrator of the General Services Administration determined only those contractors who employed the blind should be allowed to bid on contracts for supplying pens to the government. The plaintiff, who did not employ the blind, brought a suit contesting the Administrator's determination. The statute involved in this case was the Wagner-O'Day Act[74] and the Court of Appeals of the District of Columbia said it afforded Ballerina Pen the standing required. But, in reaching their decision, the court did not strictly follow *Data Processing*. It restated the three standards, but was somewhat less than rigorous in applying them.[75] In particular, the opinion seemed to

[68] This distinction is important. Before this case, a grant of standing under a particular statute meant the plaintiff was entitled to the protection of that statute. Under Data Processing, standing means less than this; the Court is now saying a party will have standing if his interests are arguably protected by the statute and, if so, he is entitled to his day in court. But, to invoke the protection of the statute, he must demonstrate he has the necessary "legal interest."

[69] Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 156 (1970).

[70] PIERSON, at 16.

[71] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Hardin v. Kentucky Utility Co., 390 U.S. 1 (1968); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[72] Flast involved constitutional questions with standing being based on a citizen's right as a taxpayer. In Hardin, it was held a private utility company had standing to sue the Tennessee Valley Authority. In Abbott Laboratories, the Court said a drug manufacturer had standing to challenge regulations promulgated by the Commissioner of Food and Drugs.

[73] 433 F.2d 1204 (D.C. Cir. 1970).

[74] 41 U.S.C. §§ 46–48 (1964). These provisions authorized the Administrator to make the determination.

[75] The grant of standing in the case is actually based more on Scanwell than a measured application of the Data Processing guidelines.

indicate that, regardless of the zone of interests of the relevant statute, a party will have standing if he is aggrieved in fact and the statute does not preclude judicial review.[76] The light treatment of the "zone of interests" criterion considerably increases the number of persons who may acquire standing. Another problem this case illustrates is the difficulty in determining how far the new concept of standing should be extended. The plaintiff was neither an unsuccessful bidder nor was he claiming the government was without authority to make the award. He was merely a potential bidder.

Blackhawk Plumbing & Heating Co. v. Driver[77] made clear that the court was giving only lip service to the *Data Processing* criteria. In this case, the plaintiff had been the lowest bidder but was not awarded the contract because the contracting officer felt he was not a responsible contractor. In holding that the plaintiff did have standing, the court repeated the three-fold test stated in *Ballerina Pen* and without any further discussion, summarily concluded Blackhawk had the needed standing.[78] The court also felt the facts had been sufficiently established below to also allow a decision on the merits. Recall that in *Data Processing* the Supreme Court made it quite clear that, to succeed on the merits, the plaintiff must show, over and above an interest "arguably protected," a "legal interest" which entitles him to the protection of the statute.[79] The *Blackhawk* court did not consider this distinction.

Another interesting point is that, for the first time, the Court of Appeals for the District of Columbia recognized that the *Scanwell* rationale may significantly interfere with the performance of important government contracts. After granting standing, the court said "[T]he mere fact that a party has standing to sue does not entitle him to render uncertain for a prolonged period of time Government contracts which are vital to the functions performed by the sovereign."[80]

In marked contrast to the reasoning of these two opinions is the

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[76] The court, in effect, is equating "arguably within the zone of interests" with an allegation that the government official involved is acting arbitrarily or without statutory authority. Such logic has to be based on the dubious assumption that Congress enacted the Wagner-O'Day Act to protect the economic interests of any party who might be injured by its application.

[77] 433 F.2d 1137 (D.C. Cir. 1970).

[78] *Id.* at 1140–41.

[79] *See* note 68 *supra.*

[80] No. 22, 956 (D.C. Cir. May 19, 1970), at 69. The same court acts on this attitude in Page Communications Engineers, Inc. v. Resor, No. 24, 787 (D.C. Cir. Dec. 4, 1970). See discussion in Section IV.B.

decision in *Park Vending Co. Inc. v. Army and Air Force Exchange Service*.[81] The case involved the award of an exchange concession. Although plaintiff's bid was the highest, he was not awarded the contract because the contracting officer determined that he had not been prompt in meeting his past financial obligations. Plaintiff contested this determination. The New Jersey federal district court was very explicit in saying that Park Vending lacked standing.

> It further appearing that established case law provides that statutes regulating the contracting procedures of officers of the Federal Government are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. Therefore, plaintiff lacks standing as either a bidder or a citizen to contest the contract award on the grounds of arbitrariness or capriciousness. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1950), ... and *Friend v. Lee*, 221 F.2d 96 (C.A.D.C. 1955).[82]

But the most extreme judicial interference with government contracts was yet to come. In *Scanwell*, the court said: "[I]t is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties."[83] The District Court for the District of Columbia did not agree for in *Schoonmaker Co. v. Resor*[84] it ordered the government to award the contract to a particular party. Up to this time, courts had directed cancellation of contract awards, but they had not made contracts for the government.

The *Schoonmaker* case involved a two-step formally advertised

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[81] No. 62–70 (D.C. N.J. Oct. 29, 1970).

[82] *Id.* at 2–3. Note that the court did not mention the recent Supreme Court case of Data Processing even though it was cited in the government's brief. Rather, they based their decision on the traditional Perkins logic.

If the court had used Data Processing as the standard, it is interesting to speculate if the plaintiff would have been successful. The regulation involved was Army Regulation 60–20, para. 4–26*b* (17 Oct. 1968); the pertinent provision reads: ". . . Award will be made to that responsive and responsible offeror whose offer is most advantageous to the AAFES, price or fee, and other factors considered." It is questionable whether the plaintiff is even arguably within the zone of interests of this statute, but granting this, does he have the necessary "legal interest" to claim its protection? The government could effectively argue he does not. To have a "legal interest," Hardin indicates there must be a "legal right" to the protection of the statutory provisions and Perkins makes it clear procurement statutes are for the protection of the government only. See Brief for Appellee at 6, No. 62–70 (D.C. N.J. Oct. 29, 1970).

It is also interesting to note that once Data Processing enunciated the "legal interest" test, the government petitioned the Circuit Court of Appeals for the District of Columbia for a rehearing of Scanwell. This petition was denied. However, there was a dissent to this denial.

[83] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 869 (1970).

[84] 319 F. Supp. 933 (D.D.C. 1970).

procurement for two different sizes of generators. Schoonmaker Co. was the lowest bidder; Bogue Co. had the second lowest bid. Bogue protested to the contracting officer that Schoonmaker's bid was non-responsive since its prices for the pre-production models and production models were not identical. In its findings of fact, the District Court concluded it was not clear from the original invitation for bids whether these prices had to be the same. In an effort to clear up this ambiguity Bogue had contacted the Army and was advised that the invitation did require identical prices. Apparently contrary to procurement regulations,[85] this information was not furnished to all other prospective bidders.[86] As a result, Schoonmaker put a higher price on the preproduction models. As a result its total bid was lower since it could recover start-up costs earlier than if they had been amortized over the entire length of the contract.

A few hours after the bid opening, Bogue filed his protest with the Comptroller General. Schoonmaker requested that it be allowed to present its side of the case. The Comptroller General said the Army's interpretation that identical prices were required "strained the meaning of the invitation" and was "clearly erroneous." However, he pointed out that Bogue was also prejudiced through no fault of its own since it knew of the Army's interpretation. He concluded the only fair thing to do was to cancel the invitation and solicit new bids. The Army cancelled the old invitation and submitted a new one. Schoonmaker then went to federal district court and secured a temporary restraining order enjoining the opening of bids on the new solicitation. Two weeks later a preliminary injunction was granted. Bogue then intervened in the action and two months later, after a full hearing of the case, the district court issued a prohibitory injunction restraining the Army from awarding the contract to anyone other than Schoonmaker and a mandatory injunction requiring the Army to let the contract to Schoonmaker.

The Court of Appeals for the District of Columbia decided *Schoonmaker* on 5 March 1971. Not unexpectedly, they cited *Scanwell* and found there was no problem with either standing or

[85] Armed Services Procurement Reg. § 2-208(a) (1 Jan. 1969) says: " . . . The amendment shall be sent to everyone to whom invitations have been furnished and shall be displayed in the bid room."

[86] The following statement by the contract negotiator explains his actions: "After reviewing the proposed answer and ASPR paragraph 2-208, it was determined that Bogue Electric was not receiving any additional information which would place them in a more favorable position. It was determined that the bidder had asked if his interpretation of the intent was correct and this part was only confirmed." B-169205 (May 22, 1970), at 8-9.

sovereign immunity. On the merits, however. the court found that the Comptroller General's original decision was neither arbitrary nor capricious and dismissed Schoonmaker's complaint.[87]

The *Schoonmaker* reasoning is vulnerable in several respects. First, the grant of standing is based on the same questionable premises which existed in *Scanwell.* Once by the standing hurdle, the court failed to show that the plaintiff had the necessary "legal interest" in the operation of the procurement system to entitle him to relief. Next, the court erroneously relied on the Administrative Procedure Act as a complete answer to the sovereign immunity question.[88] Finally, the facts and circumstances of *Schoonmaker* present clear evidence that the policy considerations cited in *Perkins* are still sound.

IV. POLICY CONSIDERATIONS

Up to this point, this article has focused on the question of whether courts *can* grant standing to unsuccessful bidders. It is now time to turn to the more important question of whether unsuccessful bidders *should* be given this standing. For it is this question to which the Supreme Court will likely turn when it finally decides the issue. Several factors will have to be considered in reaching this decision.

A. *THE ESTABLISHING OF STANDARDS*

The initial inquiry should determine if guidelines can be fashioned which will allow the lower courts to decide the cases with some consistency. The standards presently in operation are those laid down by the Supreme Court in *Data Processing.* However, in *Ballerina Pen* and *Blackhawk,* the Court of Appeals was less than rigorous in attempting to follow them in determining whether or not there was standing. Also, in the latter case, the court made no effort to determine if the plaintiff had the necessary "legal interest" in the statute to be entitled to its protection.

This failure to apply the standing tests correctly, however, may be excusable. The Supreme Court gave no guidelines on how to do it and, inevitably when dealing with procurement statutes, "[T]he plaintiff's class is neither expressly excluded nor included among

[87] As of 3 May 1971, Schoonmaker has filed a petition for rehearing with the circuit court. It is not known whether Schoonmaker will petition the United States Supreme Court for certiorari if it fails in this effort. It is likely that the government is hoping the case will get to the Supreme Court so the standing issue can be finally settled.

[88] The weakness of the argument was discussed in Section II, *supra.*

the statutory beneficiaries."[89] Even the concurring opinions in *Data Processing*, which attempt to clarify the three-part test of standing, do not explain the difference in evidence required to establish "reviewability" and "legal interest." This distinction is critical, but:

> How many courts may one realistically expect to hold that slight statutory indicia show that Congress intended the plaintiff's class to have the benefit of judicial review, but that the indicia are not strong enough to provide proof of a "specific legal interest", thus ending the court's review without ever considering the question of whether the agency action did, in fact, violate the relevant statute.[90]

The truth of this statement looms even larger when it is recognized that it has been the District of Columbia courts, those most familiar with government contracts, which have unsuccessfully wrestled with the problem up until this time. If the new concept of standing were to become a permanent part of our law, it is conceivable government contractors will utilize local district courts to a greater extent and the area will become even more confused. Just how far will the *Scanwell* concept of standing finally be extended? If the Supreme Court applies it to defense-related industries, it is very probable that a special response to the "urgent" situation will have to be developed.[91] Probably the standards for determining reviewability would be much higher for a weapons system than a standard nuts-and-bolts supply contract.

Once this hurdle is crossed, there is the difficult task of deciding how far down the line of potential plaintiff's review will be allowed. *Scanwell* gave standing to the second lowest bidder. Would the court have done the same for the sixth lowest bidder?[92] *Ballerina Pen* was more open-ended in that it allowed even a prospective bidder to have his day in court. One government counsel has observed: "Is there any logical end to the potential litigation, other than eventually running out of bidders or a Statute of Limitations"?[93] It can be further argued that the group of potential plaintiffs is not necessarily restricted to bidders. If the vindica-

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[89] PIERSON at 20.

[90] *Id.* at 23.

[91] If the procurement involves something which is badly needed, the government will claim such urgency should preclude any disruption.

[92] Recall that in Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956), the award was allegedly made to the seventh lowest bidder.

[93] Letter from Chief, Litigation Division, Office of The Judge Advocate General to Assistant General Counsel for Logistics, Department of Defense, 9 March 1970.

tion of public interest is the goal,[94] it is difficult to see how a court could deny standing to law students or informed special interest groups.[95] Rather than confining themselves to particular contract awards, cases such as *Contractors Associations v. Shultz*[96] suggest that procurement rulings and the regulations themselves might be questioned.

It is obvious the direction given thus far in standing cases has created more questions than it has answered. It is difficult to see how guidelines can be developed which will fairly limit the granting of standing so the public, rather than private, interest is the real beneficiary.

B. *NATURE OF RELIEF*

If a framework for the determination of standing can be developed, it is next necessary to consider the types of relief requested by unsuccessful bidders as well as the standards used by the courts to determine whether such relief is appropriate.

Oftentimes, the unsuccessful bidder will initially seek a temporary restraining order. If granted, there is then a hearing at which a preliminary injunction is sought. If the injunction is issued, there is a merits determination and the movant will be afforded permanent relief if the challenged government action is declared invalid.[97]

To be successful in obtaining a temporary restraining order, the aggrieved bidder must show that, as a result of a government decision, ". . . immediate and irreparable injury, loss, or damage will result . . . before notice can be served and a hearing had thereon."[98] Because of the *ex parte* nature of this proceeding, these standards are usually strictly interpreted.

The next step is the preliminary injunction. Here it is worthwhile to restate the parameters traditionally used by the courts in

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[94] In Scanwell, this was the reason the court referred to the plaintiff as a "private attorney general."

[95] 328 FEDERAL CONTRACT REPORTER K–8 (June 1, 1970).

[96] (E.D. Pa. Mar. 13, 1970). In this case, the Contractors Association was not granted standing, but individual contractors were allowed to challenge the "Philadelphia Plan" in court. This plan set specific goals of minority manpower usage in large construction contracts.

[97] The procedural progression of a case will not always follow this pattern. For instance, the contest may begin at the preliminary injunction stage. Also note that Federal Rule of Civil Procedure 65(a)(2) authorizes consolidation of the injunctive hearing and trial on the merits. This procedure enables some courts to finally decide the case with just the one hearing, skipping the need for any intermediate injunction.

[98] FED. R. CIV. P. 65 (b).

an injunctive proceeding. Generally, there are four: (1) availability of a remedy at law; (2) likelihood of success on the merits; (3) the harm that may flow from either a grant or denial of the stay; and (4) the effect of the injunction on the public interest.[99] The first consideration seldom causes any problems as the only possible legal relief is the recovery of bid preparation costs. Naturally, the movant is interested in the profits that would have come had he been awarded the contract.

Recent court evaluations of the last three factors have been influenced by the experience of the Comptroller General. His office has been the traditional source of relief for disappointed bidders[100] and courts are now having to weigh the factors that heretofore have principally been confronted by him. An analysis of his decisions shows it is important to distinguish between pre-award and post-award protests. In a pre-award protest, if the General Accounting Office believes contemplated action by the contracting officer will violate applicable regulations, the contracting agency will be prohibited from making the award.[101] In addition, the General Accounting Office may identify the protesting bidder as being eligible for the award, but rarely will it require that the award be made to a certain bidder. In the situation where a protest is made after award, even if the General Accounting Office finds the contracting officer has acted illegally, the award will usually not be disturbed.[102]

As the disparity of court opinions indicates, the Comptroller General's precedents have received differing interpretations. In *Wheelobrator Corporation v. Chaffee*,[103] the plaintiff had qualified

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[99] Page Communications Engineers, Inc. v. Resor, No. 24–787 (D.C. Cir. Dec. 4, 1970); Schwartz v. Covington, 341 F.2d 537, 538 (9th Cir. 1965); Hamlin Laboratories v. United States Atomic Energy Commission, 337 F.2d 221, 222 (6th Cir. 1964); Virginia Petroleum Jobber Associations v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958).

[100] The courts have never been given jurisdiction in the bid protest area; the analysis in this paper supports the conclusion this is not accidental. "The Comptroller General's authority in bid protest cases stems from his responsibility for assuring that appropriated funds are handled in accordance with statutory requirements. 31 U.S.C. § 65. His decisions can be enforced by his power to prevent the payment of funds on any contract awarded in contravention of law or regulation. 31 U.S.C. §§ 71 and 72. 281 FEDERAL CONTRACT REPORTER K–1 (July 7, 1969).

[101] There is an exception to this rule, however, as Armed Services Procurement Reg. § 2–407.8(b) (Rev. No. 6, 31 Dec. 1969) authorizes the agency to go ahead and make the award if sufficient urgency can be demonstrated.

[102] For an excellent discussion of the present bid protest procedure, *see* Shnitzer, *Handling Bid Protests Before GAO*, BRIEFING PAPERS (July 7, 1970). The weaknesses of this procedure are briefly discussed in Section V *infra*.

[103] 319 F. Supp. 87 (D.D.C. 1970).

on the first step of a two-step procurement. But the company refused to bid on the second step because of their claim that they had developed the contract end item to such an extent that the Navy was required to award the contract to them by negotiation. When the Navy refused, an injunction was sought to prevent the Navy from awarding the contract to anyone else. This requested stay was granted on the basis that the plaintiff had shown that it would otherwise be irreparably hurt and that the defendant's action would likely be found unlawful at a final hearing. *Page Communications Engineers v. Resor*[104] involved a contract for the operation of communication facilities in Vietnam. The Army was gradually turning over the operation of these facilities to civilian concerns who, in turn, would train the Vietnamese to operate them. Such a contract had been awarded to one of Page's competitors. Page sought to enjoin further performance under this contract because of substantial impropriety in the awarding of this contract. The district court granted the injunction,[105] but the court of appeals indicated that the factors discussed above, especially the public interest, had not been given adequate consideration. On remand, the district court refused to reinstate the preliminary injunction.[106]

An interesting point in *Page* is that the district court required Page to post a $100,000 bond before it granted the initial injunction. Federal Rule of Civil Procedure 65(c) requires the giving of security before issuance of either a temporary restraining order or a preliminary injunction, but this was the first time a bond of significant size had been required.[107] It was not clear whether the Government sought this principally as a deterrent to bringing the action or for the indicated purpose of compensation for the delay and disruption caused by the suit. The feelings of the court of appeals were much clearer: "It is evident, however, that irrespective of financial costs, delay in the implementation of this phase of the Vietnamization program could disserve the public interest."[108]

This brief analysis of preliminary injunction proceedings[109] reveals, if nothing more, the traditional difficulties of equitable bal-

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[104] No. 24,787 (D.C. Cir. Dec. 4, 1970).

[105] No. 3173–70 (D.D.C. Nov. 3, 1970).

[106] No. 3173–70 (D.D.C. Dec. 23, 1970).

[107] A $2,500 bond was required in Schoonmaker and a $1,000 bond was required in Wheelobrator.

[108] No. 24,787 (D.C. Cir. Dec. 4, 1970) at 4.

[109] For a good discussion and brief analysis of recent cases in this area, *see* Moss, *Judicial Review of Public Procurements, The Scanwell Decision*, 6 PUBLIC CONTRACT NEWSLETTER, No. 2, 1 (Jan. 1971).

ancing. For example, even though plaintiff may show that he definitely will be damaged, it may be in the best interests of at least two of the parties concerned—the government and the successful bidder—not to disturb the award. The injunction is a discretionary remedy and the problem is again to develop some guidance which will enable the lower courts to use this discretion wisely.

The problems become even more involved when the question is whether to grant permanent injunctive relief. First, the courts have to be able to distinguish whether the unfair treatment the plaintiff is complaining of is the result of an abuse of discretion or the arbitrariness or caprice of the agency. If it is the former, the courts, historically, will be reluctant to interfere unless there is a very strong showing of abuse.[110] A good example of this is *Curran v. Laird*.[111] In this case, the Department of Defense, contrary to the Cargo Preference Act which requires military cargo to be shipped aboard United States vessels, utilized foreign ships for transporting military equipment to Vietnam. Standing was granted to the complainants, but no relief. It was held that such a decision was wholly committed to agency discretion.

If the court decides the agency decision was an arbitrary action, they are again faced with the balancing process. If the award has been made and performance has begun, the scale tips, as the Comptroller General has discerned, to allowing the award to go undisturbed. An example of this reasoning is found in *Simpson Electric Co. v. Seamans*.[112] The court ruled the plaintiff had been treated unfairly by the agency's decision on a late telegraphic bid, but gave no declaratory relief.[113] Noting that the successful bidder was not a party and that he had likely already substantially performed, the court observed "injunctive relief is discretionary and should be sparingly used."[114]

If the court determines an agency action was clearly illegal, it takes no expertise to direct cancellation of the award and resolicitation of bids. But if the question of legality involves a determination of whether there has been an abuse of discretion, or if, as in the district court action in *Schoonmaker*, the court acts in place of the agency, the judges are attempting to answer "questions of judgment requiring close analysis and nice choices."[115] Such ques-

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110 328 FEDERAL CONTRACT REPORTER K–4 (June 1, 1970).

111 420 F.2d 122 (D.C. Cir. 1969).

112 317 F. Supp. 684 (D.D.C. 1970).

113 The court did say that the plaintiff should seek money damages in the Court of Claims.

114 Simpson Electric Co. v. Seamans, 317 F. Supp. 684, 688 (D.D.C. 1970).

115 Panama Canal Co. v. Grace Lines, 356 U.S. 309, 318 (1957).

tions should not be judicially reviewed, for "they involve the consideration of factors which do not lend themselves to the normal processes of the judiciary and which executive personnel are far more capable of weighing."[116]

The other type of permanent relief which must be considered is money damages. Jurisdiction in this area is based on the Tucker Act. It reads:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .[117] The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
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> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[118]

A careful reading of these provisions shows that the acquisition of standing is far from automatic. In the case of the unsuccessful bidder, the government may complain that there is not a contract on which to base jurisdiction. This argument was answered in *Heyer* by implying the existence of a contract that the government would fairly and honestly consider all bids and award the contract accordingly. It is true that *Heyer* stated that for the plaintiff to prevail, he must show clear and convincing proof of fraud, but this standard has been lowered in *Keco Industries, Inc. v. United States*.[119] In this case the government altered its original specifications to allow use of an indirect, as opposed to a direct, drive to run a government-furnished air compressor. The contract was then awarded to the contractor who, in his original technical proposal, had suggested use of the indirect drive. As it developed, the indirect drive would not work without the addition of a drive shaft. It was held by the Comptroller General that the procuring agency should pay the contractor for adding this feature. At this

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[116] Letter from Chief, Litigation Division, Office of The Judge Advocate General, to Assistant General Counsel for Logistics, Department of Defense, March 9, 1970.

[117] 28 U.S.C. § 1491 (1964).

[118] 28 U.S.C. § 1346(c) (1964).

[119] 428 F.2d 1233 (Ct. Cl. 1969).

point, the only other bidder filed suit, claiming the contract had been awarded without clear knowledge that the successful contractor's performance would be less costly. The court said this was a "sufficient allegation by plaintiff of arbitrary and capricious action on the part of the government and clearly is a violation of the rule laid down in *Heyer* that bids should be fairly and honestly considered."[120] In other words, *Heyer* was not intended to be limited to cases involving bad faith and intentional fraud.

Another possible theory of standing to recover money damages is to argue that the procurement statutes and their implementing regulations satisfy the Tucker Act language of "[J]urisdiction over claims founded upon an act of Congress or executive department regulations." The plaintiff could argue breach of these laws since the contract was not, in fact, awarded to the lowest responsible, responsive bidder whose bid would have been most advantageous to the government. The weakness of this argument is that neither the statutes nor the regulations provide such a remedy for their violation.[121]

If standing is granted and the plaintiff prevails on the merits, the court must then decide if he will recover anticipatory profits as well as costs of bid preparation. The direction the court will go in this area seems fairly clear. *Keco* reaffirmed the *Heyer* rationale that lost profits will not be awarded "since the contract under which the plaintiff would have made such profits never actually came into existence."[122] To award only preparation costs also makes sense because, even if the plaintiff had been awarded the contract initially, the government could have terminated it for convenience before performance had begun without incurring any liability for lost profits.

A further practical difficulty in implementing this new concept of standing is countering the dilemma it creates for the successful bidder. Usually he has done nothing wrong; yet he is the one who suffers most. The *Schoonmaker* litigation is illustrative of this. Bogue contacted the Army to get a clarification on an invitation for bids. Bogue was certainly not required to notify their competi-

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[120] *Id.* at 1240.

[121] 12 THE GOVERNMENT CONTRACTOR 3 (Oct. 19, 1970). A third possible theory of jurisdiction is available in cases like Simpson Electric Co. There, the court said Simpson had been wronged, but gave no relief because substantial performance had begun. With this background, a plaintiff might argue the government made an implied contract to award to the lowest, responsive, responsible bidder, and that he was that bidder because the district court had said so.

[122] Keco Industries, Inc. v. United States, 428 F.2d 1233, 1240 (Ct. Cl. 1969).

tion of what it had learned; the Army is the party who should have done this. But, in his conclusions, the district court judge said:

> As between Plaintiff and Intervenor, Intervenor may not rely upon nor claim prejudice from *ex parte* information supplied to it by the Army in violation of the Armed Services Procurement Regulations and the terms of the Army Invitation.[123]

The decision, in effect, penalized Bogue for its initiative. Why should it not be able to claim prejudice? If Bogue had not sought clarification, it would have bid on the same basis as Schoonmaker and may well have been the lowest bidder.

The successful bidder in a *Scanwell*-type situation is in no better position. Knowing that the award is being challenged, probably the prudent thing to do is to withhold performance.[124] But such prudence does not make money. Once the court enters the picture and directs that nothing be done until there is a full hearing, the successful bidder is faced with such prolonged uncertainty that his venture may prove to be unprofitable. In short, if the government makes a mistake which prejudices an unsuccessful bidder, it is difficult to correct the wrong done without prejudicing the successful bidder. The successful bidder cannot adequately protect himself because his fate is not dependent on his own actions, but those of the unsuccessful bidder, the government and the courts.

C. *HARM TO THE PROCUREMENT PROCESS*

Apart from the many practical difficulties involved, granting standing to unsuccessful bidders is likely to have a disastrous effect on the procurement process itself. The Supreme Court recognized this in *Perkins* and the situation has not changed since that time. In 1968, a district court succinctly stated the logic behind this position:

> The relief sought by plaintiffs creates great policy problems and brings into play the distinctions between powers of government. It does not require much imagination to anticipate the chaos which would be caused if the bidding procedure under every government contract was subject to review by court to ascertain if it was fairly and properly done, and the corresponding damage and delay which would be done to government business if the injunctive power of the court was used to stay contractual activities pending judicial decision.[125]

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[123] Schoonmaker Co. v. Resor, 319 F. Supp. 933, 941 (D.D.C. 1970).

[124] Recognize, however, that such an approach may place the contractor in the position of breeching his contract with the government.

[125] Lind v. Staats, 289 F. Supp. 182, 186 (N.D. Cal. 1968).

The delay which will ensue if contractors are allowed to challenge executive decisions will be very detrimental to the public interest. This potential for delay is almost limitless. In *Schoonmaker,* Bogue intervened at the district court level. Since he lost, he was entitled to appeal to the court of appeals and eventually to seek certiorari from the Supreme Court. As the loser at the court of appeals Schoonmaker might now seek review from the Supreme Court. Whatever actions the government might take would further complicate things.

At some point in time, it is very conceivable that if the responsible agency in the Schoonmaker procurement had its way, it would award the contract to any responsible firm as long as there was no further delay. Its paramount concern is the development of the end item. An extended appellate litigation would seriously hinder achieving that goal.

Critics attempt to answer this contention by saying procedures can be developed whereby "urgent" procurements will not be subject to disruptive delays. But, in many cases, such a system will merely shift the delay forward. Instead of litigation over the correctness of the award causing the delay, the delay will result from trying to decide if the procurement really is an urgent one. Admittedly, this is not going to happen if an off-the-shelf item like shoe polish is involved, but beyond this, a determination of urgency becomes difficult. For instance, nuts and bolts to be acquired in an apparently unimportant contract may be the necessary hardware required for the first step in a complex weapons system.

A closely related problem concerns the difficulty the courts are going to have in separating meritorious from unmeritorious claims. The *Scanwell* court indicated "responsible federal judges" will be able to make such determinations.[126] But this statement misses the point. Even granting that the federal bench has such expertise, it takes time to apply the expertise. Such a lapse may well interfere with a vital government function especially when the overcrowded condition of the court dockets is considered. As the Supreme Court indicated in *Perkins,* the important thing is to leave the procurement process "unhampered."

V. CONCLUSIONS

Should contractors who feel they have been treated arbitrarily or capriciously or who feel an agency has taken some action beyond its statutory authority be left without any remedy? The

[126] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872 (1970).

answer is "No." But because of the primacy of the public interest, the disputes procedure adopted is going to have to protect the interests of competing bidders in a fashion that will not allow a disruption of the procurement processes.

One suggested solution is to reform the present bid protest procedure before the General Accounting Office.[127] Suggested reforms include speeding up the decision process so the answer is not academic by the time it is made, utilizing a more balanced version of the facts, and allowing those involved in the case more opportunity to present their viewpoints. No doubt some of the recommendations are good, but one immediate observation is that the minute a procedure becomes more adversary in nature, it takes more time. When this happens, unacceptable delays in procurement contracts result. Further it is doubtful the General Accounting Office could ever administratively review government contracts with a totally unbiased attitude. Finally this office is also hampered by a lack of expertise in the government contracts field.

For the present then, the GAO protest procedure should remain unchanged. In spite of its weaknesses, it seems geared to provide redress in those cases where there is an allegation of a blatant agency violation. Its existence also is a reminder to contracting officers that their actions are subject to scrutiny.

The solution in the best interests of all concerned is to allow the unsuccessful bidder the opportunity to recoup his bid preparation costs if he feels he has been dealt with unfairly. Such a suit can be brought in the Court of Claims or in a federal district court if the amount involved is less than $10,000. Recovery of these costs affords the deserving unsuccessful bidder the maximum possible protection consistent with a policy of non-interference with government procurement. The solution requires no new legislation because the plaintiff will have standing to bring the suit under the revised *Heyer* concept which the Court of Claims announced in *Keco.*

In summary, the concept of standing announced in *Scanwell* is bad law. It is bad law because it cannot be supported by either statutory or case law. It is undesirable from a policy viewpoint because the public interest is best served by allowing procurement experts to make procurement decisions. The result of such license is that occasionally a bidder will be treated unfairly. When

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[127] Address by Theodore M. Kostos, Federal Bar Association Meeting, Oct. 6, 1970.

this happens, the procurement process should not be disrupted, but the dissatisfied bidder should be given a chance to recover his bid preparation costs. If the Supreme Court does choose to grant standing to unsuccessful bidders, then legislation should be introduced limiting the bidder's rights to these costs. Failing such legislation, the government should press for the maximum bond security possible under Federal Rule of Civil Procedure 65(b).

THE ALL WRITS ACT AND THE MILITARY JUDICIAL SYSTEM*

By Major Thomas M. Rankin**

Though long recognized in civilian practice, the exercise of All Writs Act jurisdiction in the military dates only from 1966. Despite its infancy, a substantial body of military law has arisen governing courts' powers to supply "extraordinary relief" to petitioners. After a historical survey, the author analyzes the often-conflicting military attitudes towards the All Writs Act. He notes that the concept of relief in aid of potential jurisdiction provides much of the Act's vitality in the military.

I. INTRODUCTION

The present codification of the All Writs Act, 28 U.S.C. § 1651a provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In 1966, by its decision in *United States v. Frischholz*,[1] the Court of Military Appeals first categorically declared itself to possess the authority conferred by the All Writs Act. Recently, the Army Court of Military Review has likewise assumed powers derived from the Act.[2] Before 1966, the Court of Military Appeals tended to regard its jurisdiction as being strictly circumscribed by

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[1] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

[2] United States v. Draughon, CM 419184 (ACMR, 20 Mar. 1970); *see also* dicta in United States v. Dolby, CM 419804 (ACMR, 19 Sep. 1969).

Article 67 of the Uniform Code of Military Justice.[3] In cases invoking its jurisdiction under the All Writs Act, however, the Court has said "we possess powers incidental to, and protective of, those defined in Article 67,"[4] and "Article 67 does not describe the full panoply of power possessed by this Court."[5] In these cases the court has been petitioned for relief by means of the common law extraordinary writs of coram nobis,[6] habeas corpus,[7] mandamus,[8] prohibition,[9] and certiorari.[10] In recent years petitions for extraordinary relief have been filed in military courts with increasing frequency.

Plainly, a radically innovative military judicial development has been launched. This article will examine the scope and nature of the all writs jurisdiction of military courts, assess the significance of this enlarged jurisdiction, and indicate possible future areas of adjudication. To provide context and perspective, this examination will be prefaced by a preliminary consideration of extraordinary relief and the All Writs Act. Included are a cursory review of the salient characteristics of several common law extraordinary writs, and of the historical development and judicial construction of the All Writs Act.

For the purposes of this article, ordinary relief will be regarded as appellate review, under applicable statutes, of proceedings finally terminated at an inferior level within the hierarchy of courts involved. Within the military judicial system, ordinary relief generally consists of the following:

a. Appellate relief by the Court of Military Appeals, under Article 67 of the Code, of proceedings finally decided by a court of military review.

b. Appellate relief by a court of military review, under Article 66 of the Code, over concluded court-martial proceedings in which the sentence, as finally approved by the convening author-

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[3] UNIFORM CODE OF MILITARY JUSTICE art. 67 [hereinafter cited as UCMJ]. The UCMJ is codified as 10 U.S.C. §§ 801–940 (1970 Supp.). *See, e.g.*, as representing this strict view, United States v. Best, 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1955).

[4] United States v. Frischholz, 16 U.S.C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966).

[5] United States v. Bevilacqua, 18 U.S.C.M.A. 10, 11, 39 C.M.R. 10, 11 (1968).

[6] *E.g.*, United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

[7] *E.g.*, Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

[8] *Id.*

[9] *E.g.*, Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

[10] *Id.*

ity, includes either confinement at hard labor for at least a year or a punitive discharge.

c. Appellate relief by a court of military review under Article 69 of the Code, upon request of the Judge Advocate General concerned, of the proceedings in any general court-martial, regardless of the sentence imposed.

Extraordinary relief, on the other hand, is considered to consist of one or more of the following:

a. Interlocutory intervention by an appellate court into proceedings pending trial in a lower court to prevent jurisdictional excess or usurpation by the lower court.

b. Appellate court compulsion to require action by a subordinate judicial agency which has a duty to act and refuses to do so.

c. Direct appellate revision of cases finally terminated under a strict construction of applicable judicial finality statutes.

d. Judicial review of the legality of detention.

None of these four remedies is authorized by the Uniform Code of Military Justice. Yet, remedies of these types are now available before military judicial tribunals. As these remedies are afforded by means of common law extraordinary writs, the salient characteristics of these writs will be reviewed.

II. COMMON LAW WRITS

The common law writs are ancient and their distinctions and conditions of applicability exist as a result of their common law evolution. The common law distinctions and requirements govern, in any given case, the propriety of issue and the specific type of extraordinary remedy available. While some common law writs have fallen into disuse, others continue to be employed in modern practice. Among the most often encountered in the military practice of law are the writs of mandamus, prohibition, certiorari, coram nobis and habeas corpus.

A. *MANDAMUS*

The writ of mandamus[11] is a command issued from a court of competent jurisdiction to an inferior court or officer, requiring the performance of a specified act which the court or officer has a legal duty to do.[12] Mandamus is an extraordinary writ,[13] issuable only where there is no other complete and adequate remedy.[14] The writ

[11] *See, generally,* 34 AM. JUR. MANDAMUS 803 (1941).
[12] Denver-Greely Valley Irr. Dist. v. McNeil, 106 F.2d 288 (9th Cir. 1939).
[13] United States v. Carter, 270 F.2d 521 (9th Cir. 1969).
[14] Clark v. Memolo, 174 F.2d 978 (D.C. Cir. 1949).

is available to compel both the performance of ministerial duty[15] and the exercise of judicial discretion.[16] The office of mandamus is not to establish a right, but to enforce a clear and complete right already established.[17]

The use of mandamus in aid of appellate jurisdiction has primarily been to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to act when it has a duty to act.[18] Mandamus is available to the government, in criminal cases, to require exercise of jurisdiction where there is a refusal to act.[19] It also may be used in exceptional cases of peculiar emergency or public importance where the usual method of appeal is manifestly inadequate.[20]

B. *PROHIBITION*

The writ of prohibition[21] issues from a court of competent jurisdiction and commands an inferior tribunal not to do something it is about to do.[22] The writ is extraordinary[23] and issues only where there is no other adequate remedy.[24]

Prohibition is used to prevent a tribunal having judicial or quasijudicial powers from exercising jurisdiction over matters outside its proper cognizance.[25] This use of the writ is exclusive[26] The want of jurisdiction which the writ is directed toward can relate either to person or subject matter.[27] If a lower court acts within its jurisdiction, prohibition does not lie, no matter how erroneous the judgment of the lower court.[28] Prohibition cannot lie where there is no appellate power.[29] Prohibition is primarily a restraining rather than a corrective remedy,[30] and is, in essence, the converse of the writ of mandamus, which is compulsive.

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15 United States *ex rel.* McEnnan v. Wilbur, 283 U.S. 414 (1930).
16 *Ex parte* Newman, 81 U.S. 152 (1872).
17 United States *ex rel.* Stovall v. Deming, 19 F.2d 697 (D.C. Cir. 1927).
18 Evans Elec. Constr. Co. v. McManus, 338 F.2d 952 (8th Cir. 1964).
19 United States v. Dooling, 406 F.2d 192 (2d Cir. 1969).
20 Bartsch v. Clark, 293 F.2d 283 (4th Cir. 1961).
21 *See, generally,* 42 AM. JUR. PROHIBITION 137 (1942).
22 Petition of the United States, 263 U.S. 389 (1923).
23 *Ex parte* Fassett, 142 U.S. 479 (1892).
24 Noble v. Eichar, 143 F.2d 1001 (D.C. Cir. 1944).
25 *Ex parte* Gordon, 66 U.S. 503 (1862).
26 *Ex parte* Fassett, 142 U.S. 479 (1892).
27 *Id.*
28 Leimar v. Reeves, 184 F.2d 441 (8th Cir. 1950).
29 *Ex parte* Fassett, 142 U.S. 479 (1892).
30 Leimar v. Reeves, 184 F.2d 441 (8th Cir. 1950).

C. *CERTIORARI*

Certiorari[31] is appellate in the sense that it involves a limited review of the proceedings of an inferior tribunal, and lies only to inferior courts and officers exercising judicial power.[32] It is directed to inferior courts to require the certification of the record in a terminated proceeding so the superior court may review the record.[33]

Certiorari frequently exists in statutory form, but the common law form of the writ also survives.[34] It is an extraordinary writ, and will issue only where there is no other plain and adequate remedy, by appeal or otherwise.[35] Generally, only the court of last resort within a judicial system has power to issue certiorari.[36]

Law courts have a general superintending control over inferior tribunals which is not entirely taken away by a statutory declaration that judgments shall be final.[37] This characteristic of certiorari makes it available to obtain review of unappealable or otherwise unreviewable decisions in terminated cases. Certiorari is a revisory writ, existing to correct errors of law apparent on the face of the record.[38]

D. *CORAM NOBIS*

At common law, the writ of coram nobis[39] was employed to bring before a court a judgment previously rendered by the same court for the purpose of reviewing an error of fact, not apparent from the record, affecting the validity and regularity of the prior proceeding.[40] The error of fact disclosed properly relates to some matter existing, but unknown, at time of trial, which, when known, vitiates the proceedings.[41]

Coram nobis is an extraordinary remedy, issuable only where no other adequate remedy exists.[42] To furnish a basis for relief, the error complained of must be of such a fundamental character as to

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[31] *See, generally*, 14 AM. JUR. 2d CERTIORARI 775 (1964).
[32] United States v. Elliott, 3 F.2d 496 (W.D. Wash. 1924), *aff'd* 5 F.2d 292 (9th Cir. 1925).
[33] *Id.*
[34] House v. Mayo, 324 U.S. 42 (1945).
[35] *In re* Chetwood, 176 U.S. 443 (1897).
[36] Superior Court v. District Court, 256 F.2d 844 (9th Cir. 1958).
[37] Angelus v. Sullivan, 246 F. 54 (2d Cir. 1917).
[38] United States v. Elliott, 3 F.2d 496 (W.D. Wash. 1924), *aff'd* 5 F.2d 292 (9th Cir. 1925).
[39] *See, generally*, 18 AM. JUR. 2d CORAM NOBIS 445 (1965).
[40] Ward v. United States, 381 F.2d 14 (10th Cir. 1967).
[41] United States v. Calp, 83 F. Supp. 152 (D. Md. 1949).
[42] United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).

render the proceedings in which it was committed invalid.[43] Currently, recognized grounds for issuance of the writ include violation of the constitutional right to counsel,[44] failure to inform a defendant of his right to court-appointed counsel before acceptance of his guilty plea,[45] and the lack of mental capacity to commit the offense charged.[46]

A criminal judgment may be attacked by coram nobis by one who has not begun to serve the sentence he is attacking,[47] or by one whose sentence has been served.[48]

E. *HABEAS CORPUS*

The term habeas corpus[49] generically describes a variety of common law forms of the writ. Most often, however, the unqualified term is used to describe the writ of habeas corpus ad subjuciendum.[50] This is the so-called Great Writ, in comparison to which the other common law forms of habeas corpus are relatively insignificant.[51]

Habeas corpus ad subjuciendum issues from a court of competent jurisdiction to an officer or person who is detaining another, requiring that the detained person be brought before the court for the purpose of inquiry into the legality of detention.[52] Habeas corpus ad subjuciendum is not only an extraordinary writ,[53] but is held by the United States Supreme Court to be the highest remedy in law for any person imprisoned.[54]

Habeas corpus, in general, functions to bring a person before a court for whatever action may be essential to the proper disposition of a cause.[55] The lesser common law species of the writ serve the purpose of production of a person before court for reasons unrelated to legality of restraint. Other common law species of the writ include habeas corpus ad prosequendum and habeas corpus ad testificandum, which issue to remove a prisoner to prosecute him,

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[43] Scarponi v. United States, 313 F.2d 950 (10th Cir. 1967).
[44] United States v. Morgan, 346 U.S. 502 (1954).
[45] Mathis v. United States, 369 F.2d 43 (4th Cir. 1966).
[46] United States v. Valentino, 201 F. Supp. 219 (E.D.N.Y. 1962).
[47] United States v. Deckard, 381 F.2d 77 (8th Cir. 1967).
[48] Holloway v. United States, 393 F.2d 731 (9th Cir. 1968).
[49] *See, generally*, 39 AM. JUR. 2d HABEAS CORPUS 417 (1968).
[50] *See* Carbo v. United States, 364 U.S. 611 (1961).
[51] *See*, for classification of common law species of habeas corpus, Price v. Johnston, 334 U.S. 266, 281, n.9 (1948).
[52] *Ex parte* Tom Tong, 108 U.S. 556 (1883).
[53] Jung Woon Kay v. Carter, 88 F.2d 297 (9th Cir. 1937).
[54] Smith v. Bennett, 365 U.S. 708 (1961).
[55] Price v. Johnston, 334 U.S. 266 (1948).

to enable him to testify, or to insure that he is tried in a court of proper jurisdiction.[56] These writs resemble regular criminal processes, and they appear never to have been regarded as extraordinary in nature.

F. *SUMMARY*

A review of the characteristics of the extraordinary writs shows that three of them, coram nobis, certiorari and habeas corpus attack finally adjudicated proceedings, where no further right of appeal exists. In the case of coram nobis and certiorari the attack is direct and proceedings involve no new parties. Coram nobis is an actual step and continuation of the original proceedings and not another separate action.[57] Certiorari is appellate in nature, involving a review of the record below for errors of law apparent on the record.[58] Habeas corpus ad subjuciendum, on the other hand, collaterally attacks the proceedings of another court.[59] New parties and issues are involved and the question of guilt or innocence is not involved.[60] A determination that restraint is illegal can have the collateral effect of voiding proceedings wherein restraint was imposed.[61]

By issuance of writs of prohibition or mandamus, there is an intervention by a superior court during the pendency of proceedings in an inferior court. The court intervening interlocutorily can by writ of prohibition terminate proceedings where there is no jurisdiction,[62] or it can by writ of mandamus compel exercise of jurisdiction[63] where there is a failure to act.

The extraordinary writs have common characteristics, as well as distinctions. Two of these common characteristics are fundamental, and affect the grant of extraordinary relief in any case. First, the grant of an extraordinary writ is an act of judicial discretion on the part of the court to which application is made.[64] Second, extraordinary writs do not issue it there is another ade-

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[56] *Id.*

[57] Abel v. Tinsley, 335 F.2d 514 (10th Cir. 1964); McDonald v. United States, 356 F.2d 980 (10th Cir. 1966).

[58] Degge v. Hitchcock, 229 U.S. 162 (1913).

[59] Goto v. Lane, 265 U.S. 395, 401 (1924).

[60] *Ex parte* Tom Tong, 108 U.S. 556 (1883).

[61] *Id.*

[62] *Ex parte* Gordon, 66 U.S. 503 (1862).

[63] United States v. Dooling, 406 F.2d 192 (2d Cir. 1969).

[64] Wade v. Mayo, 334 U.S. 672 (1948) (certiorari); *Ex parte* Peru, 318 U.S. 578 (1943) (mandamus and prohibition); Darr v. Burford, 339 U.S. 200 (1950) (habeas corpus); Deckard v. United States, 381 F.2d 77 (8th Cir. 1967) (coram nobis).

quate remedy available.[65] Mandamus, prohibition, certiorari, coram nobis, and some forms of habeas corpus are all issuable in aid of jurisdiction under the All Writs Act,[66] and provide judicial means to effectuate the Act.

III. THE ALL WRITS ACT

A. *LEGISLATIVE DEVELOPMENT*

The statutory precursor of the present All Writs Act was Section 14 of the Judiciary Act of September 24, 1789.[67] The all writs portion of Section 14 provided:

> That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.[68]

The remaining portion of Section 14 granted to the federal courts habeas corpus power to inquire into the "cause of commitment," where there was federal custody.[69]

Section 14 had numerous statutory derivatives. The first sentence of the Section subsequently became 28 U.S.C. § 1651a, the present All Writs Act. The remaining portion of Section 14 exists today as 28 U.S.C. § 2241, the federal habeas corpus statute. Thus, the All Writs Act and the federal habeas corpus

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[65] *Ex parte* Peru, 318 U.S. 578 (1943).

[66] Chickaming v. Carpenter, 106 U.S. 663 (1883) (Mandamus); U. S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945) (Prohibition); Holiday v. Johnson, 313 U.S. 342 (1941) (Certiorari); United States v. Morgan, 346 U.S. 502 (1954) (Coram nobis); Price v. Johnston, 334 U.S. 266 (1948) (Habeas corpus).

[67] 1 Stat. 81.

[68] The "before-mentioned courts" had reference to the Supreme Court and the circuit and district courts, provided for by preceding provisions of First Judiciary Act.

[69] Section 14, Judiciary Act of September 24, 1789, 1 Stat. 81, reads in full:

"*And be it further enacted,* That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into cause of commitment. *Provided, That* writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

statute had a common origin in Section 14 of the Judiciary Act of September 24, 1789, but from this common origin they had had separate and dichotimized statutory evolutions.[70]

B. *JUDICIAL CONSTRUCTION*

The All Writs Act has beeen described as the legislatively approved source of procedural instruments designed to achieve the rational ends of justice.[71] The basic purpose of the statute is, according to federal judicial interpretation, to assure the various federal courts power to issue appropriate writs and orders of an auxiliary nature in aid of their respective jurisdictions as conferred by other provisions of law.[72] Jurisdiction conferred by the All Writs Act is regarded as ancillary and dependent upon primary jurisdiction independently conferred by other statutes.[73] Conversely stated, jurisdiction under the All Writs Act is nonexistent where there is no primary jurisdiction to which the All Writs Act can attach.

In construing the All Writs Act, the federal courts follow the view that to determine when use of a writ to aid jurisdiction is "agreeable to the usages and principles of law" resort must be had to the common law.[74] Thus, by judicial interpretation, common law principles operate to determine what writs are within the purview of the Act[75] or when the grant of a writ is proper. In conforming to "the usages and principles of law," federal courts also apply the fundamental common law requirement that extraordinary relief in

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[70] Upon revision of the federal statutes in 1874, the first sentence of Section 14, the all writs portion, was reenacted as Revised Statutes § 716. This reenactment omitted from the statute the general habeas corpus power formerly contained in Section 14. The power reappeared in Revised Statutes, § 751, and was reorganized with § 752 and § 753, which were derived from the second part of Section 14.

The All Writs Act was subsequently reenacted as Section 264 of the Judicial Code of 1911 and as Section 377 of the early (1940) edition of Title 28, United States Code. In the All Writs Act final reenactment in 1948 as 28 U.S.C. § 1651a, the authority to issue writs of *scire facias*, formerly contained, was omitted. The only authority conferred by the statute in its final reenactment is the power to issue "all writs" in aid of jurisdiction. The development of these two lines of statutory authority is described in Carbo v. United States, 364 U.S. 611 (1961).

[71] Harris v. Nelson, 394 U.S. 286, *reh. den.*, 394 U.S. 1025 (1969).

[72] Edgerly v. Kennelly, 215 F.2d 420 (7th Cir. 1954), *cert. den.* 348 U.S. 938 (1955).

[73] See Benson v. St. Board of Parole and Probation, 384 F.2d 238 (9th Cir. 1968), *cert. den.* 391 U.S. 954 (1968).

[74] United States v. Hayman, 342 U.S. 205 (1952); Virginia v. Rives, 100 U.S. 313 (1879).

[75] *Cf., e.g.*, Price v. Johnston, 334 U.S. 266 (1948); U. S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945)

aid of jurisdiction is improper where another adequate remedy is available.[76] Accordingly, the doctrine of exhaustion of remedies applies to grants of extraordinary relief under the All Writs Act.

Judicial decisions have helped to delineate the appellate jurisdiction that may properly be aided by the All Writs Act. It is now well established that an appellate court may invoke the Act to aid either actual or potential appellate jurisdiction.[77] Actual jurisdiction exists where appellate jurisdiction has attached by the filing of an appeal. Potential jurisdiction exists where proceedings are pending in a court inferior to the appellate court which may be ultimately appealable to the appellate court.[78] The doctrine that an appellate court may, by writ, properly aid its potential jurisdiction is highly significant in a consideration of the power conferred by the All Writs Act. This single aspect of the Act makes possible appellate intervention at interlocutory stages of inferior court proceedings and accounts largely for the uniqueness of all writs authority.

In the federal judiciary, aid to appellate jurisdiction is held to be appropriate where a lower tribunal exceeds[79] its own or usurps[80] another court's jurisdiction, fails to exercise its jurisdiction where it has a duty to act,[81] or acts in such a manner as to thwart or defeat ultimate appellate jurisdiction.[82] Traditionally, this involved the use of certiorari, mandamus, or prohibition.[83] In 1954, the Supreme Court's holding in *United States v. Morgan*,[84] enlarged the scope of the All Writs Act to include the writ of coram nobis. In this five to four decision the dissent cogently argued that use of this common law writ did not aid jurisdiction as the sentence resulting from the conviction assailed had been fully served. The majority viewed coram nobis as a step in criminal trial proceedings, issuable by the federal district court where trial originated. Thus, coram nobis as approved in *United States v. Morgan*, must be regarded as in aid of jurisdiction of the trial

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[76] *Cf, e.g., Ex parte* Peru, 318 U.S. 578 (1943).

[77] Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943); McClellan v. Carland, 217 U.S. 280 (1911).

[78] For discussion of the distinction between actual and potential appellate jurisdiction, and illustrative citations, see *In re* Previn, 204 F.2d 419 (1st Cir. 1953).

[79] *E.g.*, Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943).

[80] *E.g.*, LaBuy v. Howes Leather Co., 352 U. S. 249 (1957).

[81] *E.g.*, United States v. Dooling, 406 F.2d 192 (2d Cir. 1969).

[82] *E.g., In re* Josephson, 218 F.2d 174 (1st Cir. 1954).

[83] U.S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945). *See* Wolfson, *Extraordinary Writs in the Supreme Court Since Ex parte Peru*, 51 COLUM. L. REV. 977 (1951).

[84] 346 U.S. 502 (1954).

court which made the error, rather than of a higher appellate court.

Habeas corpus writs properly issue in aid of jurisdiction under the All Writs Act.[85] However, in comparison with the writs previously discussed, the use of habeas corpus by federal courts *in aid of jurisdiction* has been rare. Moreover, when federal courts have had occasion to resort to habeas corpus in aid of jurisdiction, the writ has been used primarily as a procedural device to obtain a prisoner's presence in court where such presence was vital to the determination of a pending cause.[86] This use of habeas corpus as an auxiliary writ seems in no way to involve a grant of extraordinary relief, but instead resembles the ordinary judicial process to secure the presence of parties and witnesses. In making this use of habeas, courts must first look to the common law to determine the proper writ.[87] However, if no common law form of habeas corpus fits a situation where it is necessary to bring a prisoner to court, the court may issue its own generic variety of habeas corpus to insure the prisoner's presence.[88]

In *Carbo v. United States*,[89] the Supreme Court had occasion to consider the source of general habeas corpus power.[90] The Court held that the territorial limitations applicable to issuance of habeas corpus ad subjuciendum by a district court pursuant to 28 U.S.C. 2241 did not apply to a writ of habeas corpus ad prosequendum issued by a district court pursuant to the same statute. The circuit court had held the writ was authorized by the All Writs Act. Significantly, the Supreme Court refrained from relying on the All Writs Act to authorize habeas corpus ad prosequendum and relied instead on 28 U.S.C. 2241. The majority's opinion in

[85] Price v. Johnston, 334 U.S. 266 (1948).

[86] *Id.*; United States v. Hayman, 342 U.S. 205 (1952); Adams v. United States, 317 U.S. 269 (1942).

[87] United States v. Hayman, 342 U.S. 205 (1952).

[88] Price v. Johnston, 334 U.S. 266 (1948) (habeas corpus to allow prisoner filing *pro se* petition to argue his own appeal). That federal courts have rarely, if ever, considered habeas corpus ad subjuciendum in connection with the All Writs Act is not surprising. While authority to issue writs in aid of jurisdiction and the general habeas corpus power originally resided together in Section 14 of the first Judiciary Act, these two types of writ authority came to be conferred by different lines of statutory authorization, and habeas corpus ad subjuciendum has invariably issued under 28 U.S.C. 2241 and its statutory predecessors. Issuing under the All Writs Act have been the less prestigious varieties of habeas corpus where the grant of the writ does not carry the possibility of terminating the prisoner's prosecution. This is strictly an auxiliary procedural use of the writ and not a separate civil inquiry that attacks collaterally, which a proceeding by habeas corpus ad subjuciendum is. *Ex parte* Tom Tong, 108 U.S. 556 (1883).

[89] 364 U.S. 611 (1961).

[90] *See also, Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

Carbo tends to sustain the view that the general habeas corpus power formerly expressly contained in the All Writs Act, was transferred by the 1874 legislative revision to the line of statutes dealing expressly with habeas corpus, and that habeas corpus power of any sort disappeared from the All Writs Act.[91] Certainly, express habeas corpus terminology, if not the habeas corpus power, disappeared from the All Writs Act in the 1874 legislative revision.[92] While habeas corpus issues under the All Writs Act to aid jurisdiction, *Carbo* indicates a reluctance to rely on the All Writs Act to authorize habeas corpus of any type and a preference to rely on 28 U.S.C. 2241.

IV. THE ESTABLISHMENT OF ANCILLARY JURISDICTION OF MILITARY COURTS UNDER THE ALL WRITS ACT

The Court of Military Appeals has asserted its jurisdiction under the All Writs Act and now regularly exercises the Act's powers. Assumption of the Act's powers by the Courts of Military Review is now only incipient. The question of what powers under the Act, if any, may be exercised by officers presiding at courts-martial has not received legislative or judicial answer.

A. *THE COURT OF MILITARY APPEALS' ASSUMPTION OF ALL WRIT POWERS*

Immediately following the Supreme Court's decision in *United States v. Morgan*, there appeared suggestive statements about the Court of Military Appeals' power to grant extraordinary relief under the All Writs Act. The first statement appeared in *United States v. Best*[93] In this case, the opinion refers to "possible extraordinary proceedings"[94] and, citing *United States v. Morgan* and 28 U.S.C. § 1651a, to an appellate court's wide scope of action to protect and preserve its integrity.[95] In another 1954 decision,

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[91] United States v. Carbo, 364 U.S. 611 at 614, 615.

[92] Two cases judicially construing the All Writs Act are of singular interest to military lawyers. The cases are *Ex parte Vallandingham*, 68 U.S. 243 (1864), and *In Re Vidal*, 179 U.S. 126 (1900). In both cases direct review of decisions of military tribunals was sought. In both cases, the Supreme Court was petitioned to take jurisdiction by certiorari to be issued under earlier statutory versions of the All Writs Act. In neither case was the petitioner successful.

[93] 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954).

[94] *Id.* at 584, 16 C.M.R. at 158.

[95] *Id.* at 585, 16 C.M.R. at 159.

United States v. Ferguson,[96] the separate opinion of Judge Brosman contains argument favoring, in a command influence case, a grant of extraordinary relief under the All Writs Act.[97]

By 1958, the court, *in United States v. Buck*, was willing to assume its power to grant extraordinary relief and find that the case before it presented no basis for extraordinary relief.[98] The next year, an application designated as petition for writ of error coram nobis was made to the Court of Military Appeals in *United States v. Tavares*.[99] Again, the court assumed it had jurisdiction to entertain a petition for writ of coram nobis.[100] Decision of the jurisdictional issue raised was declined, and instead it was found that the case before the court presented no grounds justifying extraordinary relief.

The Court of Military Appeals went a step further in 1961 and, in *In re Taylor*, acknowledged that it undoubtedly had incidental powers under 28 U.S.C. § 1651a.[101] The court also made an initial delineation of these incidental powers by excluding from their scope the review of military administrative determinations.[102] The court recognized the auxiliary nature of jurisdiction under 28 U.S.C. § 1651a by noting that since review of an administrative finding was sought, aid of its jurisdiction over court-martial proceedings was not involved.[103]

Finally, in 1966, the Court of Military Appeals unequivocally held it possessed the powers conferred by the All Writs Act by its decision in *United States v. Frischholz*.[104] In *Frischholz*, the petitioner attacked a conviction finalized five years earlier by application for a writ of coram nobis. The Government objected to the court's entertainment of the petition under 28 U.S.C. § 1651a, interpreting that statute to apply exclusively to courts created by Congress under Article III of the Constitution. The Court of Mili-

[96] 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954).
[97] *Id.* at 86–87, 17 C.M.R. at 86–87.
[98] 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).
[99] 10 U.S.C.M.A. 282, 27 C.M.R. 356 (1959).
[100] The opinion of Judge Ferguson further assumed that an appellate court played some part where coram nobis was sought. Additionally, possible problems with military coram nobis arising from the impermanence of courts-martial were noted. 10 U.S.C.M.A. 282, 283–84, n. 1, 27 C.M.R. 356, 358–59, n. 1. The court was aware of inherent difficulty arising from the grant of coram nobis by an appellate court, and of the problem of whether the writ could be adapted to the military judicial system.
[101] 12 U.S.C.M.A. 427, 430, 31 C.M.R. 13, 16 (1961).
[102] The court had been petitioned to review a determination by the Air Force Judge Advocate General decertifying an officer as law officer and general court counsel.
[103] *In re* Taylor, 12 U.S.C.M.A. 427, 430, 31 C.M.R. 13, 16 (1961).
[104] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

tary Appeals rejected the government's interpretation and held that although it existed under Article I of the Constitution, it was, nevertheless, a "court established by Act of Congress" in the meaning of 28 U.S.C. § 1651a, and that as such it possessed powers conferred by the statute.

B. *THE COURT OF MILITARY APPEALS ASSERTS BROAD POWERS UNDER THE ALL WRITS ACT*

1. *Interlocutory Intervention to Prevent Jurisdictional Excess*

The decision of the Court of Military Appeals in *Gale v. United States*[105] initially established the power of the Court to make an interlocutory intervention into a pending trial by court-martial. In *Gale*, the law officer had dismissed charges referred to trial by general court-martial on grounds of lack of speedy trial and improper pre-trial confinement. The convening authority, under Article 62 of the Code,[106] ordered the law officer to reconsider his ruling and the trial to proceed. At this point a petition for "writ of certiorari and or writ of prohibition and motion to dismiss" was filed in the Court of Military Appeals by the accused. Termination of court-martial proceedings at an interlocutory stage was sought. The Government contended that the Court of Military Appeals was without jurisdiction to grant extraordinary relief prior to the return of findings and sentence and their review by the convening authority and a board of review.[107] The Court of Military Appeals rejected this contention, reasserted its ancillary jurisdiction under the All Writs Act, and stated:

> We conclude, therefore, that, in an appropriate case, this Court clearly possesses the power to grant relief to an accused prior to the completion of courtmartial proceedings against him.[108]

On the merits the petition was denied by the court, which noted that the "proceedings now pending against the accused are not void for want of jurisdiction. . . ."[109] Since jurisdiction existed, the Court properly denied the writ. However, the court's rejection of the Government's jurisdictional objection clearly established that the Court of Military Appeals has authority, where there is no jurisdiction, to intervene in a court-martial and terminate proceedings prior to their completion. This was a radical departure from previous military procedure.

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[105] 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).
[106] UCMJ art. 62.
[107] *Cf.* UCMJ art. 67.
[108] Gale v. United States, 17 U.S.C.M.A. 40, 43, 37 C.M.R. 306, 307 (1967).
[109] *Id.*

2. *Judicial Review of Legality of Restraint.*

In *Levy v. Resor*, the court initially announced its willingness to judicially review the legality of restraint.[110] Levy had been convicted by general court-martial and sentenced to confinement at hard labor for three years, total forfeitures and dismissal. The convening authority ordered Levy confined during the pendency of further appellate procedures. Levy then filed a petition for writs of habeas corpus and mandamus in the Court of Military Appeals, which took jurisdiction on the authority of *United States v. Frischholz*. By his petition, Levy did not attack the legality of his conviction. Instead, attack was directed toward the legality of imposition of confinement pending further proceedings. It was contended that confinement under the circumstances of the case illegally violated the Constitution and certain provisions of the Uniform Code of Military Justice. These contentions were rejected and the petition denied. The court however, expressly stated it had power to grant habeas corpus in an appropriate case.

Levy v. Resor concerned review of the legality of post-trial confinement. In *Lowe v. Laird*[111] the petitioner contended, inter alia, that the conditions of pre-trial confinement were unduly onerous. These contentions were reviewed by the Court and found to be unsubstantiated. This petition in the nature of habeas corpus, again, did not challenge the validity of pending proceedings or the Government's right to try the accused.[112]

In *Levy* and *Lowe*, the Court of Military Appeals acknowledged its power to review the legality of restraint where there is either pre-trial or post-trial confinement. As pending judicial proceedings were not and could not have been disturbed by this assertion, the power asserted was something less than the power to grant the writ of habeas corpus ad subjuciendum.

3. *Judicial Review of Unappealable Decisions.*

For the purposes of this article, judicial finality is regarded as occurring when the law does not provide for appellate review, or when appeals are exhausted.[113] Decisions of the Court of Military

[110] 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). *See also*, Lowe v. Laird, 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969); *but see* Hallinan v. Lamont, Misc. Docket No. 68–20, 27 Dec. 1968

[111] 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969).

[112] In Lowe v. Laird, petitioner primarily sought, by a writ designated as habeas corpus, to terminate pending proceedings on grounds of pernicious command influence. Relief was denied. Despite the designation of the writ applied for, this case is regarded, on the first basis of relief alleged, as an application for writ in the nature of prohibition.

[113] *See*, in connection with military cases, UCMJ arts. 66, 67, 69, and 76. *Cf.*, also, Hunter v. Wade, 169 F.2d 973 (10th Cir. 1948).

Appeals held that in neither of these two situations are further extraordinary proceedings precluded.

In *Frischholz*,[114] petitioner's conviction had been finalized by a Court of Military Appeals' denial of petition for review[115] 5 years before he petitioned the court for extraordinary relief. The Government, therefore, contended that the finality provisions of Article 76 of the Code [116] prohibited extraordinary proceedings in the case. The court rejected the Government's contention on the basis that Article 76 had never been held to bar further review where fundamental questions of jurisdiction were involved.[117]

The court, in *United States v. Bevilacqua*[118] addressed the question of whether it could by extraordinary proceedings entertain jurisdiction over final proceedings which were outside its jurisdiction under Article 67 of the Code. The petitioner Bevilacqua had been convicted by special court-martial, and sentenced to reduction and partial forfeitures. Following denial of relief by the convening authority and the Air Force Board for Correction of Military Records, petition for writ of error coram nobis was filed in the Court of Military Appeals. The Government interposed the strong jurisdictional objection that under Articles 66 and 67 of the Code [119] the court was powerless to consider the petition, as the sentence adjudged did not extend to confinement at hard labor for a year or a punitive discharge. Relying on its powers under the All Writs Act, its supervisory power,[120] and a professed willingness to protect and preserve constitutional rights of persons in the armed forces, the court rejected the Government's contention saying that—

> . . . this Court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial.[121]

The petition was denied, as the court found no "deprivation of any constitutional right" or "denial of any fundamental right accorded by the Uniform Code of Military Justice."[122]

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[114] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

[115] United States v. Frischholz, 12 U.S.C.M.A. 727, 30 C.M.R. 417 (1961).

[116] UCMJ art. 76.

[117] United States v Frischholz, 16 U.S.C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966).

[118] 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1969).

[119] UCMJ arts. 66, 67.

[120] Which it had asserted in Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

[121] United States v. Bevilacqua, 18 U.S.C.M.A. 10, 11–12, 39 C.M.R. 10, 11–12 (1969).

[122] *Id.*

The court in *Bevilacqua*, thus announced assumption of a power sufficiently comprehensive to permit acceptance of jurisdiction over any court-martial involving a constitutional deprivation or denial of a fundamental right. Full application of this doctrine would, of course, bring within the scope of the court's jurisdiction a vast class of cases not previously included—all courts-martial where sentence as adjudged and approved did not extend to confinement at hard labor for at least a year or punitive discharge. Furthermore, application of the principle enunciated in *Gale v. United States* would permit interlocutory intervention in these cases. The habeas corpus powers asserted by the Court would, perhaps, have applicability as well. Clearly, *United States v. Bevilacqua* contained implications of enormous potential significance.

C. *COURT OF MILITARY APPEALS RESTRICTS THE POWERS ASSERTED*

By its decision in *United States v. Snyder*[123] the court withdrew, substantially, if not completely, from the position taken in *United States v. Bevilacqua*. Snyder had been tried by special court-martial and received an approved sentence of reduction in grade. As the offense involved was committed off-post, Snyder contended, in reliance on the principles laid down by the Supreme Court in *O'Callahan v. Parker*,[124] that he was not subject to court-martial jurisdiction. Following denial of relief under Article 69 of the Code[125] by the Air Force Judge Advocate General, application for writ of error coram nobis was made to the Court of Military Appeals. The Court dismissed the petition on the basis that it had no jurisdiction under the principles enunciated in *United States v. Bevilacqua*. *Bevilacqua* had been the sole authority for invocation of the court's jurisdiction. Referring to its decision in that case, the court said—

> What we there stated concerning our duty and responsibility to correct deprivations of constitutional rights within the military system must be taken to refer to cases in which we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved. Resort to extraordinary remedies such as those available under the All Writs Act, supra, cannot serve to enlarge our power to review cases but only to aid us in the exercise of the authority we already have.[126]

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[123] 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).
[124] 395 U.S. 258 (1969).
[125] UCMJ art. 69.
[126] United States v. Snyder, 18 U.S.C.M.A. 480, 483, 40 C.M.R. 192, 195 (1969).

Concluding, the court found "no basis which permits us to review a special court-martial in which the sentence adjudged and approved extends only to reduction."[127] This is precisely what Bevilacqua's sentence had extended to, except that he was sentenced in addition to partial forfeitures.

The facts in *Bevilacqua* and *Snyder* are virtually identical. The legal principles contained in the two cases are in direct contradiction, and the two decisions are absolutely irreconcilable. Although *Snyder* did not expressly overrule *Bevilacqua*, the latter case must be regarded as having little viability in view of *Snyder*.

D. *ALL WRITS POWER AND LOWER MILITARY COURTS*

1. *Courts of Military Review.*

While Article 67 of the Code [128] makes mandatory the appointment by the President of Court of Military Appeals judges, different provision is made for creation of the various Courts of Military Review. Article 66 (a)[129] provides that the Judge Advocate General of each service will establish a Court of Military Review. The legal issue thus becomes whether, within the purview of the All Writs Act, the Courts of Military Review are "established by Act of Congress or by administrative action of the Judge Advocate General concerned."

This question was first considered by a panel of the Army Court of Military Review in *United States v. Dolby*.[130] The court, by dicta, regarded itself as being established by Act of Congress. The court's rationale was that the role of the Judge Advocate General in the establishment of the Court of Military Review was only ministerial and that Congress, by providing legislatively for the court's existence, established it.

The Army Court of Military Review, when assembled en banc, was however, not unanimous with respect to its all writs powers. Indicative of the shades of judicial view existing on this question are the majority, concurring and dissenting opinions in *United States v. Draughon*.[131] The dissent advanced the dubious view that, even though the Judge Advocate General was statutorily directed to establish a Court of Military Review, there was no such court until he acted pursuant to the legislative mandate, and therefore,

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127 *Id.*
128 UCMJ art. 67.
129 UCMJ art. 66*a*.
130 CM 419804, 19 Sep. 1969.
131 7 CRIM. L. REP. 2055, 20 Mar. 1970.

the Judge Advocate General, and not Congress, established the Court of Military Review.

The reasoning of the dissent is weak in comparison with the rationale in *Dolby*. The language of Congress, in Article 66 of the Code is imperative, making mandatory the creation of the Courts of Military Review. The Judge Advocates General are left with no discretion as to whether they will establish them. Therefore, their role can only be regarded as ministerial, giving effect to the will of Congress. Bolstering the view that the Courts of Military Review are "established by Act of Congress" is the fact, noted in *Dolby*, that the Supreme Court has referred to the boards of review, statutory antecedents of the Courts of Military Review, as military appellate tribunals "Congress has established."[132]

It is conceivable that the all writs powers of the Courts of Military Review are broader than those possessed by the Court of Military Appeals. The latter court regards its authority under the All Writs Act as being available only in aid of its jurisdiction over cases properly before it, or which may eventually reach it.[133] Court of Military Appeals jurisdiction is, under Article 67 of the Code, conditioned upon a previous review by a Court of Military Review. The jurisdictional criteria established by Article 66 for the Courts of Military Review, therefore affect the Court of Military Appeals. As a result Court of Military Appeals review is limited, generally, to cases where approved sentence extends to a punitive discharge or confinement at hard labor for one year or more. The jurisdiction conferred on Courts of Military Review by Article 69 of the Code,[134] however, is dependent only on a finding of guilty and sentence by a general court-martial. It is plausible to argue that, to aid jurisdiction conferred by Article 69, the Courts of Military Review have power to grant extraordinary relief where there has been a finding of guilt and sentence by a general court-martial, regardless of the character of discharge or length of confinement imposed.[135] The *possibility* of reference by a Judge Advocate General under Article 69 might suffice to create potential appellate jurisdiction in a Court of Military Review over any general court-martial proceedings. If so, Courts of Military Review could intervene during the pendency of any general court-martial proceedings.

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[132] Noyd v. Bond, 395 U.S. 683, 690 (1969).

[133] United States v. Snyder, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

[134] UCMJ art. 69.

[135] See United States v. Snyder, 18 U.S.C.M.A. 480, 481, 40 C.M.R. 192, 193 (1969). The language of the court strongly suggests the view asserted herein.

The Courts of Military Review could furthermore take jurisdiction by coram nobis or common law certiorari after conviction where sentence did not extend to either a punitive discharge or confinement at hard labor for a year or more. This result logically follows from the idea that the Courts of Military Review derive from Article 69 any potential appellate jurisdiction.

2. *Courts-Martial Convened by Military Commanders.*

Courts-martial are authorized by legislation enacted by Congress in Title 10 of the United States Code. This legislation prescribes the manner in which courts-martial will be established. Nevertheless, the view herein taken is that courts-martial are not "courts established by Act of Congress" within the purview of the All Writs Act, and that consequently no powers derived from the Act are to be exercised by officers presiding at courts-martial.

The fundamental reason for this view is the essential role of the convening authority in the establishment and control of a court-martial. Title 10 of the United States Code confers authority on military commanders to establish courts-martial. This is quite different from the outright legislative creation of a court. The difference probably is crucial where the All Writs Act is concerned.

In contrast with the *ministerial* or *administrative* nature of the several Judge Advocates General's roles in establishing the Courts of Military Review,[136] the convening authority takes *judicial* action in the convening of a court-martial.[137] The ministerial action of the Judge Advocates General was mandated by legislation. They were not delegated discretion to establish Courts of Military Review. On the other hand, a convening authority has discretion to convene a court-martial. His action is a condition precedent to the existence of a court-martial. Theoretically, if no court-martial was ever convened, there would be no violation of the provisons of Title 10. Furthermore, the Judge Advocates General were never given authority to abolish the Courts of Military Review.[138] This, however, is exactly what a convening authority is empowered to do to a court-martial he has established. Consequently, courts-martial have only an impermanent and *ad hoc* existence which is dependent on the will of the commander and not the mandate of Congress. This is in stark contrast with a court established by congressional enactment, which thereafter is open for

[136] UCMJ art. 66.
[137] UCMJ arts. 22, 23, 24.
[138] UCMJ art. 66 provides that each judge advocate "shall" establish a Court of Military Appeals, and nothing more.

the general disposition of cases, and which exists until repeal of legislation establishing it. These considerations are submitted as being dispositive of the question of whether Congress or the military commander establishes a court-martial, within the meaning of the All Writs Act.[139]

V. THE COURT OF MILITARY APPEALS' EXERCISE OF ALL WRITS POWERS

Since 1969, decisions of the Court of Military Appeals have further defined the scope of all writs powers asserted by the court. Decisions of the court now tend to indicate with considerable clarity the type of extraordinary relief that is available and the situation where it is proper.

A. *SCOPE OF JURISDICTION*

The scope of jurisdiction now asserted by the Court of Military Appeals is both defined and limited by certain relatively recent holdings of the court. Conforming to the literal terminology of the All Writs Act, the court has held that its ancillary powers under the Act are properly invoked only in aid of primary jurisdiction, conferred by other provisions of law.[140] Accordingly, since the Court has no primary jurisdiction over cases decided prior to May 31, 1951,[141] it has no ancillary jurisdiction under the All Writs Act over these same cases.[142]

The Court of Military Appeals, stating the basic limits of its ancillary jurisdiction in *United States v. Snyder*, said of its actual jurisdiction:

> Article 67 . . . empowers this Court to review the record of a court-martial in three categories of cases:
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> "... (1) all cases in which the sentence, as affirmed by a Court of Military Review, affects a general or flag officer or extends to death;
>
> "(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

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[139] The question of what, if any, are the all writs powers of the military judge has been recognized but not decided by the Court of Military Appeals. Zamora v. Woodson, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970).

[140] United States v. Snyder, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969). The court is, however, split at the present time on scope of primary jurisdiction that may be aided by ancillary jurisdiction under the All Writs Act. This subject will be treated later in this article.

[141] The effective date of the Uniform Code of Military Justice.

[142] United States v. Homcy, 18 U.S.C.M.A. 515, 40 C.M.R. 227 (1969).

> "(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review."
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> From the foregoing, it is apparent that appeals to this Court in the ordinary course are from decisions of the Courts of Military Review —formerly designated boards of review. Those bodies' jurisdiction, in turn, depends upon the sentence adjudged and approved in particular cases, i.e., whether such affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more.[143]

As the court points out, its appellate powers ultimately rest, generally, upon the sentence adjudged and approved in particular cases. Consistent with its view of its primary jurisdiction, the court has held that under the All Writs Act, it has no ancillary jurisdiction in non-judicial punishment cases[144] summary court-martial cases,[145] and special court-martial cases not involving the possibility of a punitive discharge.[146] Furthermore the court has been steadfast in its refusal to review the legality of military administrative determinations under the All Writs Act.[147] It is now relatively clear that the Court of Military Appeals' ancillary jurisdiction under the All Writs Act attaches when charges are initially preferred.[148]

While the members of the court are in accord that the All Writs Act is to be utilized only in aid of jurisdiction, there is currently a lack of consensus as to the scope of the courts primary jurisdiction, conferred by Article 67 of the Code, which may properly be aided by the Act. Conflicting views on this subject emerged clearly in *Collier v. United States*,[149] where Judge Darden opposed the majority view held by Judges Ferguson and Quinn.

In *Collier*, the court granted extraordinary relief in the nature of habeas corpus to invalidate an order rescinding deferment of sentence and to release Collier from illegal confinement. Judge Darden's dissent expressed the view that habeas corpus to consider the legality of restraint does not aid jurisdiction. Judge Darden acknowledged that federal judicial practice permits the

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[143] 18 U.S.C.M.A. 480, 481, 40 C.M.R. 192, 193 (1969).
[144] Whalen v. Stokes, 19 U.S.C.M.A. 636 (1970).
[145] Thomas v. United States, 19 U.S.C.M.A. 639 (1970).
[146] Hyatt v. United States, 19 U.S.C.M.A. 635 (1970).
[147] Hurt v. Cooksey, 19 U.S.C.M.A. 584, 42 C.M.R. 186 (1970); Mueller v. Brown, 18 U.S.C.M.A. 534, 40 C.M.R. 246 (1969).
[148] Manning v. Healy, 19 U.S.C.M.A. 636 (1970); *In re* Moorefield, 19 U.S.C.M.A. 633 (1970); Tompson v. Chafee, 19 U.S.C.M.A. 631 (1970).
[149] 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970).

use of the All Writs Act to aid both actual and potential jurisdiction. He stated, however:

> It seems clear, however, that such a broad view of extraordinary writ powers in aid of jurisdiction is still predicated on the *threat of loss of the Court's appellate powers over the subject matter.*[150]

Judge Darden's view restricts aid to potential jurisdiction only to that category of cases where judicial action or inaction below tends to thwart or defeat ultimate appellate review. While this use of extraordinary relief conforms to the "traditional use"[151] recognized by the federal view, it is an unduly restrictive view of aid to potential jurisdiction. Other "traditional uses" recognized by the Supreme Court are the prevention of judicial usurpation[152] and the compulsion of required judicial action in cases of inaction.[153] Judge Darden would regard cases of these types inappropriate for resort to all writs powers. In this respect his narrow view is in conflict with both federal practice and the majority view of the Court of Military Appeals.[154]

The ancillary jurisdiction of the Court of Military Appeals, conferred by the All Writs Act attaches either when an appeal is lodged with the court and actual appellate jurisdiction attaches, or when charges are preferred which, in view of the table of maximum punishments[155] or type of court referred to, may result in a sentence from which the Court of Military Review and Court of Military Appeals review is authorized. This latter condition for attachment of ancillary jurisdiction recognizes the propriety of ancillary jurisdiction in aid of potential appellate jurisdiction. As noted earlier this novel legal doctrine is the source of much that is

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150 *Id.* at 517, 42 C.M.R. at 119.

151 *See, e.g.*, McClelland v. Carland, 217 U.S. 268 (1910).

152 *See, e.g.*, DeBeers Cons. Mines v. United States, 325 U.S. 212 (1945); *Ex parte* Peru, 318 U.S. 578 (1943); Petition of United States, 263 U.S. 389 (1923); United States v. Mayer, 235 U.S. 55 (1914).

153 *See, e.g.*, McClelland v. Carland, 217 U.S. 268 (1910); *In re* Grosamayer, 177 U.S. 48 (1900); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

154 *Cf., e.g.*, Doherty v. United States, 20 U.S.C.M.A. 163, 43 C.M.R. 3 (1970) (petition for mandamus to order delay of Calley trial pending completion of article 32 investigation on charges arising out of same incident as Calley charge denied); Henderson v. Resor, 20 U.S.C.M.A. 165, 43 C.M.R. 5 (1970) (denial of petition for mandamus to compel production of investigative report believed to be basis for ordering of article 32 investigation); Parisi v. Pearson, 19 U.S.C.M.A. 626 (1970) (mandamus to compel convening authority to produce records of conscientious objector application denied); McDonald v. Flanagan, 19 U.S.C.M.A. 585, 42 C.M.R. 187 (1970) (petition seeking pretrial injunction against participation in trial by assistant defense counsel on grounds of prior participation in defense denied).

155 MANUAL FOR COURTS MARTIAL, UNITED STATES (1969 REVISED ED.) chapter XXV.

unique about the All Writs Act. Its acceptance by the Court of Military Appeals makes possible interlocutory intervention by the court into cases pending trial by court-martial[156] or further appellate proceedings.[157] Accordingly, an initial exercise of ancillary jurisdiction to aid potential appellate jurisdiction may be later dissolved by a conviction not involving a punitive discharge or confinement at hard labor for one year or more.[158] In this respect the Court of Military Appeals ancillary jurisdiction under the All Writs Act is, in any given case, elastic.

The court's view of the scope of its ancillary jurisdiction is now basically defined by the *Snyder* case and is sufficiently broad to encompass aid to both actual and potential court-martial jurisdiction. Currently, it stands midway between the broad extreme the court adopted initially in *Bevilacqua* and the restrictive limit advocated by Judge Darden in *Collier*. Recent indications, however, suggest a tendency toward adoption of the restrictive view advocated by Judge Darden.[159]

B. *NATURE OF AVAILABLE EXTRAORDINARY RELIEF*

Earlier in this article, four types of extraordinary relief were identified and contrasted with ordinary appellate relief in the military judicial system. Each of these four types of relief is now available in an appropriate case, by means of an extraordinary writ allowable under authority of the All Writs Act. Some species of such relief, particularly habeas corpus, have characteristics found only in the military judicial system. Other species of military relief share common characteristics with those in the federal civilian judiciary.

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[156] *E.g.*, Fleiner v. Koch, 19 U.S.C.M.A. 630 (1969).

[157] *E.g.*, United States v. Collier, 19 U.S.C.M.A. 511, 42 C.M.R 113 (1970).

[158] An example is the not unusual situation where a court-martial sentence extending to either a punitive discharge or confinement at hard labor for at least a year is cut by the convening authority so as to include no discharge and confinement for less than a year In this situation, potential appellate jurisdiction existing before action by the convening authority is cut off. Under United States v. Snyder, further extraordinary proceedings would be precluded.

[159] *See* Court of Military Appeals memorandum opinions in Font v. Seaman, Misc. Docket No. 71–6, 2 Mar. 1971, and Osborne v. Bowman, Misc. Docket No. 71–8, 1 Mar. 1971. In the former case the court, speaking of its authority under 28 U.S.C. § 1651a: "Such action may only be taken in aid of our jurisdiction, that is, when necessary or appropriate to preserve the exercise of possible future jurisdiction in the normal course of appellate review." In the latter case the Court, denying relief: "Nothing contained in this petition, nor in any of the exhibits attached thereto, remotely suggests action tending to defeat this Court's possible future jurisdiction, nor to prevent the rendition of any relief shown to be necessary during the course of normal appellate review.

1. *Prevention of Jurisdictional Excess*

As earlier indicated, a traditional use of the All Writs Act in federal judicial practice has been to confine an inferior court to the lawful exercise of its jurisdiction, usually by means of the writ of prohibition or mandamus. Pending proceedings are terminated by issuance of the writ as, of course, a finding of no jurisdiction removes the entire basis of prosecution.

In recent years, numerous petitions seeking extraordinary relief to terminate pending courts-martial for alleged jurisdictional deficiencies have been filed with the Court of Military Appeals. Almost without exception the court has denied relief. However, in *Fleiner v. Koch*[160] the Court initially found the appropriate case, for the grant of extraordinary relief to terminate court-martial proceedings. Jurisdictional defect was found in *Fleiner* on the basis that charges pending against petitioner were outside the ambit of court-martial jurisdiction under the principles of *O'Callahan v. Parker*.[161] A second case, *Zamora v. Woodson*[162] soon followed. In *Zamora* the reason for termination of pending proceedings was that the conflict in Vietnam was not "time of war" within the purview of the legal provision conferring court-martial jurisdiction over civilians "in time of war."[163]

A consideration of cases where prohibition on the grounds of jurisdictional defect is sought clearly illustrates the significance, in terms of all writs powers, of the opinion division manifested in *Collier*. The weight of current authority is that the court has power to terminate pending courts-martial where there is no military jurisdiction. However, if the court swings to the position advocated by Judge Darden and there are incipient indications that this is a possibility, the court will not continue to terminate jurisdictionally excessive pending courts-martial by extraordinary writs. This is because Judge Darden would establish, as a *sine qua non* of the court's exercise of ancillary jurisdiction, the *threat of loss of the Court's appellate powers over the subject matter*. The jurisdictional issue is clearly reviewable on appeal.[164] Therefore, completion of a jurisdictionally defective court-martial does not thwart or defeat a subsequent appeal. This being true, there is no

[160] 19 U.S.C.M.A. 630 (1969).
[161] 395 U.S. 258 (1969).
[162] 19 U.S.C.M.A 403, 42 C.M.R. 5 (1970).
[163] UCMJ art. 2(10).
[164] *Cf., e.g.*, United States v. Allen, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969); United States v. Hallahan, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969); United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969); United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969).

authority, following Judge Darden's view, under the All Writs Act to empower the Court of Military Appeals to terminate jurisdictionally defective courts-martial prior to their completion. It is now already questionable whether this type of extraordinary relief continues to be available within the military judicial framework.

2. *Judicial Coercion to Require Action by Inferior Courts and Judicial Officers.*

Another traditional use of mandamus and prohibition in the federal judiciary is to require an inferior court or judicial officer to act.[165]

In this area, the Court of Military Appeals has, again, been requested to require a military judge or convening authority to do a wide variety of acts. Often petitions are dismissed on a finding that the duty alleged is non-existent.[166] However, petitions filed to compel performance of a legal duty have not been uniformly abortive. There is a category of cases in which petitions were filed alleging failure by the convening authority to take action upon a record of trial and requesting proper relief. Upon issuance of a show cause order by the Court of Military Appeals, the convening authority acted, making moot the issue raised by the petition. The petitions were thereupon dismissed as moot.[167]

These cases suggest that extraordinary relief to compel convening authorities to fulfill their legal obligations is available from the Court of Military Appeals. This is in complete consonance with all-writs practice within the federal jurisdiction. It also conforms with Judge Darden's requirement of a loss of appellate powers as a condition precedent to resort to the All Writs Act. This is because Article 66 of the Code,[168] upon which Court of Military Appeals jurisdiction ultimately depends, makes approval of sentence by the convening authority a prerequisite to appellate review. Inaction by the convening authority for an unreasonable period of time tends to defeat or thwart the exercise of appellate jurisdiction.

3. *Review of the Legality of Restraint.*

The Court of Military Appeals said in *Levy v. Resor*[169] that in a

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[165] Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943); United States v. Dooling, 406 F.2d 192 (2d Cir. 1969).

[166] *See*, footnote 154, *supra*.

[167] Vasquez v. United States, 19 U.S.C.M.A. 637 (1970); McNeil v. United States, 19 U.S.C.M.A. 637 (1970); Culver v United States, 19 US.C.M.A. 637 (1970).

[168] UCMJ art. 66

[169] 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

proper case, it had the power to issue the writ of habeas corpus. The Supreme Court in 1969 held that a type of habeas corpus is available from the Court of Military Appeals and that this remedy must be exhausted before aid may be sought in the federal civilian courts.[170] Petitions have subsequently been filed with the Court of Military Appeals seeking to review the legality of pretrial restraint, to challenge the post-trial refusal to defer sentence, and to attack pending proceedings by relief in the nature of habeas corpus. From these proceedings, has emerged a reasonably clear delineation of the nature of military habeas corpus.

The Court of Military Appeals first examined allegations of improper pretrial confinement in *Lowe v. Laird*.[171] While relief was denied, *Lowe v. Laird* apparently established a basis for review of the legality of pretrial confinement by means of application for extraordinary relief. The standard of review was specifically stated in *Harmon v. Resor:*

> The type of restraint, if any, to be imposed on an accused prior to trial presents a question for resolution by the commanding officer, *in the exercise of his sound discretion. His decision will not be reversed in the absence of an abuse of discretion.*[172]

This statement plainly implies that if a commander abuses discretion in ordering pretrial confinement, extraordinary relief is available. Reinforcing this implication is the fact that the court, in other cases, reviewed the exercise of discretion by commanders imposing pretrial restraint and found no abuse.[173] No cases have been found, however, where an accused has been successful in obtaining release from unlawful pretrial restraint by means of extraordinary relief.

Legality of posttrial restraint during pending appellate proceedings has likewise, since *Levy v. Resor*, been subject to the scrutiny of the Court of Military Appeals. Determined on application for writ of habeas corpus have been such issues as whether confinement during pendency of appeal constitutes illegal execution of sentence[174] or is in violation of Army regulations.[175]

Levy v. Resor was decided before the effective date of the Mili-

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[170] Noyd v. Bond, 395 U.S. 683 (1969).

[171] 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969).

[172] 19 U.S.C.M.A. 285, 286, 41 C.M.R. 285, 286 (1970) (Emphasis supplied). *See, also,* Kline v. Resor, 19 U.S.C.M.A. 288, 41 C.M.R. 288 (1970).

[173] *E.g.,* Dexter v. Chaffee, 19 U.S.C.M.A. 289, 41 C.M.R. 289 (1970); Smith v. Coburn, 19 U.S.C.M.A. 291, 41 C.M.R. 291 (1970).

[174] Reed v. Ohman, 19 U.S.C.M.A. 110, 41 C.M.R. 110 (1969). No illegal execution found to exist. Case decided on merits. *See, also,* Walker v. Commanding Officer, 19 U.S.C.M.A. 247, 41 C.M.R. 247 (1970).

[175] Dale v. United States, 19 U.S.C.M.A. 254, 41 C.M.R. 254 (1970).

tary Justice Act of 1968, with its provisions for post-trial deferment of sentence by discretionary decision of the convening authority.[176] However, *Levy v. Resor* would seem to sustain the view that the decision to restrain pending appeal is reviewable for discretionary abuse. In dicta contained in *Reed v. Ohman*, the Court of Military Appeals cited *Levy v. Resor* for this very proposition.[177] Finally, in *Collier v. United States*,[178] the court held the decision to reconfine Collier after his release, pursuant to the sentence deferment provisions of the Code, was reviewable for abuse of discretion. Judge Darden dissented on the grounds that the All Writs Act afforded no jurisdictional basis to grant the relief sought.

In *Collier*, the Court of Military Appeals granted the petition for extraordinary relief in the nature of habeas corpus and ordered the petitioner released from custody. At the time of the grant of extraordinary relief, the normal appellate proceedings in *Collier* were before the court. Thus, as an appeal was pending when extraordinary relief was granted, the court apparently perceived that it was acting to aid its actual, rather than potential, appellate jurisdiction.

Collier v. United States stands for the proposition that, the Court of Military Appeals may review the decision of a commander in ordering restraint during the pendency of appellate proceedings. This holding, as Judge Darden's dissent demonstrates, rests upon a rather tenuous legal basis. The court, quoting an earlier case, in *Horner v. Resor*[179] said of its jurisdiction under 28 U.S.C. § 1651a:

> . . . it must further appear that the conduct of [the] stockade and the actions of the confinement officials tend to deprive this Court of jurisdiction to review the cases of prisoners involved in accordance with Article 67 of the Code. . . .

The court thus seems to have vacillated between the "threat of loss of appellate powers" criteria urged by Judge Darden in *Collier*, and the liberal standard of the *Collier* majority.

It is difficult, if not impossible, to conceive of a situation where an appellate court's jurisdiction, either actual or potential, is ever actually affected by the restraint status of the accused during the pendency of either trial or appellate procedures. The *Collier* litigation clearly illustrates this fact. Denial of extraordinary relief

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[176] UCMJ art. 57.
[177] 19 U.S.C.M.A. 110, 115, 41 C.M.R. 110, 115 (1970).
[178] 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970).
[179] Hallinan v. Lamont, 18 U.S.C.M.A. 652 (1968).

would not have resulted in the loss of actual appellate jurisdiction. This use of extraordinary relief appears, in fact, to be for the purpose of prevention of jurisdictional excess by inferior judicial officers rather than the purpose of preserving appellate jurisdiction. It, furthermore, resembles the exercise of supervisory power by an appellate court.[180] It is only on this basis that the majority decision in *Collier* or military habeas corpus for the purpose of inquiry into the legality of restraint are sustainable.

Military habeas corpus under the All Writs Act, like civilian habeas corpus in aid of jurisdiction, is undoubtedly a very limited type of habeas corpus.[181] Proceedings in the nature of habeas corpus ad subjuciendum are separate civil proceedings which collaterally attack other criminal proceedings.[182] This cannot be said of military habeas corpus under the All Writs Act. Dissenting in *Collier*, Judge Darden said:

> Habeas corpus in aid of jurisdiction is strikingly different from habeas corpus as an original and independent proceeding under specific statutes such as Sections 2241, 2242, and 2243 of Title 28, United States Code.[183]

Military habeas corpus under the All Writs Act seems to be of the sort sanctioned by the Supreme Court in *Price v. Johnston*,[184] which is a type unknown to the common law but developed by the courts to remedy a particular legal irregularity. Military habeas corpus of the type that reviews legality of restraint must have as its basis under the All Writs Act the prevention of jurisdictional excess, because it is unsustainable on any theory that its use preserves appellate jurisdiction. Additionally, habeas corpus under the All Writs Act is, presumably, available within the military for purposes other than review of the legality of restraint. To an extent consonant with availability in the federal civilian courts, this availability covers limited situations and involves use of the lesser varieties of habeas corpus.[185]

4. *Appellate Review of Finally Adjudicated Cases.*

The final category of extraordinary relief includes those cases

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[180] *See generally*, Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

[181] This is explicitly recognized in Allen v. Van Cautfort, 420 F.2d 525 (1st Cir. 1970).

[182] Goto v. Lane, 265 U.S. 395, 401 (1924).

[183] 19 U.S.C.M.A. 511, 517–18, 42 C.M.R. 113, 119–20 (1970).

[184] 334 U.S. 266 (1948).

[185] *See*, United States v Hayman, 342 U.S. 205 (1951); Price v. Johnston, 334 U.S. 266 (1948); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Whitney v. Dick, 202 U.S. 132 (1906).

which, according to regular statutory provisions, have been finally adjudicated, but in which extraordinary relief is available to provide further remedy. In the federal civilian judiciary, such relief is provided, primarily, by the writs of coram nobis[186] and common law certiorari.[187] In the military judiciary, *United States v. Frischholz*[188] established a foundation for such relief by holding that Article 76 of the Code does not preclude the entertainment, under the All Writs Act, of a petition for coram nobis to review a case decided by the court some five years earlier. In later cases the court has entertained jurisdiction over finally adjudicated cases to allow corum nobis to inquire into sanity at time of the commission of the offense[189] and to consider the retroactive applicability of evidentiary[190] and jurisdictional[191] decisions of the Supreme Court.

In the small number of cases which are final under Article 76 of the Code and in which the possibility of further extraordinary proceedings exists, there is a lack of unanimity on the court. For example, in *Mercer v. Dillon*,[192] the court ruled on the retroactivity of *O'Callahan v. Parker*. The issue was raised by petition filed in a case finalized under Article 76 two years earlier. Judge Darden stated that the "Court is not unanimous in viewing the consideration of extraordinary relief in this instance as being in aid of jurisdiction, as section 1651 of Title 28, United States Code" requires.[193] Judge Darden subsequently articulated in his jurisdictional views in *Collier* and has since consistently adhered to them.[194]

Judge Darden feels that application of all writs powers to cases finalized under Article 76 does not aid the court's jurisdiction by

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[186] United States v. Morgan, 346 U.S. 502 (1954); United States v. Lavelle, 306 F.2d 216 (2d Cir. 1962); United States v. Valentino, 201 F. Supp. 219 (E.D.N.Y. 1962).

[187] *Cf., e.g.*, United States Alkali Export v. United States, 325 U.S. 196 (1945); House v. Mayo, 324 U.S. 42 (1945); Steffler v. United States, 319 US. 38 (1943); *Ex parte* Chetwood, 165 U.S. 443 (1897).

[188] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

[189] United States v. Jackson, 17 U.S.C.M.A. 681, 36 C.M.R. 101 (1968).

[190] United States v. Gooding, 18 U.S.C.M.A. 188, 39 C.M.R. 188 (1969).

[191] Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

[192] *Id.* In this case, petitioner's conviction was affirmed by a board of review in 1967. In 1968 the Court of Military Appeals denied a petition for review. By subsequent petition for post-conviction extraordinary relief petitioner attacked the validity of his conviction on grounds that O'Callahan v. Parker, 395 U.S. 258 (1969), had retroactive application. The Court of Military Appeals took jurisdiction and, on the merits, denied relief.

[193] *Id.* at 264–65, 41 C.M.R. at 264–65.

[194] *Cf., e.g.*, Enzor v. United States, 20 U.S.C.M.A. 257, 43 C.M.R. 97 (1971); Mitchell v. Laird, 20 U.S.C.M.A. 195, 43 C.M.R. 35 (1970); Henderson v. Resor, 20 U.S.C.M.A. 165, 43 C.M.R. 5 (1970); McDonald v. Flanagan, 19 U.S.C.M.A. 585, 42 C.M.R. 187 (1970).

removing a threat of lost appellate power. This position is well reasoned when applied to cases finalized by previous action of the court. It would seem that judicial action, following the acquisition of actual appellate jurisdiction, exhausts appellate jurisdiction and leaves nothing to be added in subsequent extraordinary proceedings. Entertainment of jurisdiction in a subsequent extraordinary proceeding wherein a complete vitiation of a previous conviction is sought is nothing less than an exercise of original jurisdiction in the nature of habeas corpus ad subjuciendum.[195] This is the apparent result of the *Mercer* decision. and represents a misapprehension of aid to appellate jurisdiction under the All Writs Act.

Thus, in *Mercer* the Court took an overly-broad view of its powers to act in cases where it has taken final action under Article 76. *Snyder*, on the other hand, represents a narrow interpretation, inconsistent with the view taken by the federal civilian judiciary, of authority to grant extraordinary relief where judicial finality has ordinarily occurred. Federal courts recognize that common law certiorari is available to appellate courts in extraordinary cases to correct errors of law made by inferior tribunals, and that legal provisions making the inferior judgment final do not preclude this availability.[196] *Snyder* is in conflict with this proposition because the interpretation of all writs authority made by the Court of Military Appeals is not broad enough to allow certiorari to take jurisdiction over a case finally adjudicated at a lower tribunal.

VI. SUMMARY AND CONCLUSIONS.

Assumption by military appellate courts of the authority conferred by the All Writs Act radically alters the nature and scope of legal redress available within the military judicial system. This is true notwithstanding the fact that relief is reserved for extraordinary cases and is therefore rarely granted. The existence of the possibility of successful application for extraordinary relief, rather than the number of successful petitioners, is the development having significance for military law.

What is legally unique about the All Writs Act is the use of extraordinary writs to aid actual and, most especially, potential

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[195] In Mercer, the application was titled "Petition for Reconsideration or Alternatively for a Petition for Writ of Habeas Corpus or in the Alternative for a Writ in the Nature of Error Coram Nobis." See 19 U.S.C.M.A. 264, 41 C.M.R. 264, footnote 1. Counsel for petitioner apparently sought relief in the nature of habeas corpus ad subjuciendum.

[196] McClelland v. Carland, 217 U.S. 280 (1911); Angelus v. Sullivan, 246 F. 54 (2d Cir. 1917).

appellate jurisdiction. It is difficult to overstress the importance of aid to *potential* appellate jurisdiction in any consideration of the All Writs Act. This can be isolated as the ultimate source of most that is legally singular as far as the All Writs Act is concerned.

The nature and scope of authority conferred on military courts by the All Writs Act has been since 1969 in a state of flux. Attesting to this is the conflict between *Snyder* and *Bevilacqua*, and the split of opinion on the Court of Military Appeals on the question of what aid to appellate jurisdiction is proper. Beyond this are such unanswered questions as whether relief available from the Courts of Military Review must be exhausted before jurisdiction of the Court of Military Appeals is invoked, and what authority, if any, military judges have under the All Writs Act.

A future adoption by the Court of Military Appeals of Judge Darden's "threat of loss of appellate power" standard would drastically reduce the scope of the court's jurisdiction under 28 U.S.C. § 1651a: Conformity to this restrictive standard would entirely destroy any basis to review legality of restraint, to intervene in court-martial proceedings to determine jurisdictional issues, or to review decisions previously finalized. There are, as has been noted, concurrent indications of a swing by the Court to the jurisdictional position advocated by Judge Darden.

In accordance with the discussion contained herein, it is speculatively concluded that—

a. The military court-martial is not established by Act of Congress within the purview of the All Writs Act. The Act therefore confers no powers upon those officers judicially controlling the court-martial.

b. The Courts of Military Review are established by act of Congress, within the meaning of the All Writs Act and possess the powers conferred by that statute.

c. The Court of Military Appeals, to promote orderly judicial processes and alleviate docket crowding, should require as a condition precedent to acquisition of jurisdiction under 28 U.S.C. § 1651a, the exhaustion of extraordinary remedies available from the Courts of Military Review.

d. The All Writs Act confers no power to exercise original civil jurisdiction by proceedings in the nature of habeas corpus ad subjuciendum.

e. The jurisdictional position adopted by the Court of Military Appeals in *Snyder* is unduly restrictive in that it precludes supervision by the common law writ of certiorari over convictions finalized by inferior judicial tribunals.

f. The jurisdictional position advocated by Judge Darden in *Collier* is too narrow because it cannot be reconciled with the traditional application of the All Writs Act which permits interlocutory use of extraordinary relief to confine an inferior judicial officer or tribunal to a lawful exercise of jurisdiction.

The development of a body of law relating to extraordinary relief under the All Writs Act within the military judicial still is in the early stages. Future developments in this area will significantly affect the administration and furtherance of military justice.

COMMENTS

UNLAWFUL ENTRY AND RE-ENTRY INTO MILITARY RESERVATIONS IN VIOLATION OF 18 U.S.C. §1382*

By Lieutenant Colonel Jules B. Lloyd**

I. INTRODUCTION

The authority of an installation commander to exclude individuals from his post is based upon regulations[1] and has long been recognized as one of the powers inherent in his command.[2] However, this authority to exclude does not, in itself, contain any effective means of preventing such individuals from re-entering at will. In 1909 Congress enacted the first legislation designed to prevent the unlawful entry or re-entry of military reservations.[3] The present version of this statute provides as follows:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—shall be fined not more than $500 or imprisoned not more than six months, or both.[4]

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[1] Army Reg. No. 210–10, para. 1–15 (30 Sep. 1968); Army Reg. No. 633–1, para. 8 *c* (13 Sep. 1962).

[2] Cafeteria Workers Union v. McElroy, 367 U.S. 886, 893 (1961); 26 OP. ATT'Y GEN. 91, 92 (1906); 3 OP. ATT'Y GEN. 268, 269 (1837); JAGA 1925/680.44 (6 Oct. 1925); JAGA 1904/16272 (6 May 1904). *But see*, footnote 1 in Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

[3] As originally enacted, this statute provided that: "Whoever shall go upon any military reservation, army post, fort or arsenal, for any purpose prohibited by law or *military regulation* made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both." (Emphasis added.) Act of March 4, 1909, ch. 321, § 45, 35 Stat. 1097.

[4] 18 U.S.C. § 1382 (1964).

One question raised by this statute is the degree to which intent becomes an element of the offense. The first paragraph of this statute contains the words "for any purpose prohibited by law or lawful regulation." In *United States v. Bradley*,[5] the only reported case in which violation of this specific paragraph was charged, the conviction was reversed on other grounds and the question of intent was never discussed. However, in *Holdridge v. United States*,[6] a case involving violation of the second paragraph, dicta indicates that intent would be a necessary element of any offense charged under the first paragraph.[7] Since intent is frequently a difficult element to prove, it is apparent that the first pararaph of this statute is of limited applicability.

The contrary result, however, must be reached when the offense charged is a violation of the second paragraph. This paragraph contains no words relating to purpose or intent, but makes the physical act or presence the thing prohibited. In *Holdridge* the court stated, "We therefore regard § 1382's second paragraph as falling into that category where . . . intent may properly be omitted as an element of the offense." [8]

The second paragraph of the statute prohibits re-entering or being found on the installation after having been removed therefrom or ordered not to re-enter. In *United States v. Ramirez Seijo*, the court said, "That the defendant was forbidden to enter upon the installation by an officer or a person in charge or command of it and that thereafter, knowingly and fully aware of such prohibition, he did so enter has not been proven by the United States." [9] This conclusion logically follows from the wording of the statute. This wording clearly indicates that the person charged must have been ordered not to re-enter, and such order must have been communicated to him. The communication of the order not to re-enter is part of the government's prima facie case.

The language of the statute clearly indicates that the order not to re-enter must be issued by the commanding officer or person in charge of the installation. In *United States v. Ramirez Seijo*, the accused had been barred from a particular airfield by the Area Engineer of the Army Corps of Engineers. The district court reversed the conviction, holding *inter alia* that there was no proof

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[5] 418 F.2d 688 (4th Cir. 1969).

[6] 282 F.2d 302 (8th Cir. 1960).

[7] *Id.* at 309.

[8] *Id.* at 310.

[9] 281 F. Supp. 708, 711 (D.C. P.R. 1968).

that the Area Engineer was the person in charge of that part of the installation allegedly invaded by the accused.[10]

It would seem advisable for the commanding officer *personally* to issue the order not to re-enter the post. Moreover, the order should either be in writing or recorded in such manner as to be easily susceptible of proof.[11] There are situations, however, when such personal action by the commanding officer would not be practicable. The factors to be considered when such conditions exist will be discussed in section V.

The second paragraph of the statute makes it unlawful to re-enter or be found upon the installation after having been removed therefrom. Unlike the bar order, it is not clear from a reading of the statute whether the removal must be ordered by the officer or person in command. The Army regulation which governs such actions requires that such removal must be upon orders from the commanding officer.[12] Since there are no reported cases in which removal has not been accompanied by an order not to re-enter, this precise question has not yet been adjudicated. However, the sounder conclusion is that such removal must be by, or at the direction of, the commanding officer.[13]

II. MILITARY INSTALLATIONS

A. *DEFINITIONS*

Army regulations define an installation as being:

> A military facility in a fixed or relatively fixed location together with its buildings, building equipment, and subsidiary facilities such as piers, spurs, access roads, and beacons. . . .
>
> Real estate and improvements thereon under the control of the Department of the Army at which functions of the Department of

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[10] 281 F. Supp. 708 (D.C.P.R. 1968).

[11] U. S. DEP'T OF ARMY PAMPHLET, NO. 27–164, MILITARY RESERVATIONS, para. 10.3 (1965) [hereinafter cited as DA PAM 27–164].

[12] Army Reg. No. 633–1, para. 8c (13 Sep. 1962), reads as follows:

"*Ejection.* Persons not subject to military law who are found within the limits of military reservations in the act of committing a breach of regulations, not amounting to a felony or a breach of the peace, may be removed therefrom upon orders from the commanding officer, and ordered by him not to reenter. For penalty imposed upon reentrance after ejection, see Title 18, United States Code, Section 1382."

[13] This conclusion is consistent with generally accepted rules of statutory construction. *See, e.g.*, 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4921 (1943 ed.); E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 193 (1940 ed.).

> the Army are carried on and which has been established by order of the Department of the Army.[14]

The above definition implies that a military installation is any real estate so designated by the Department of the Army. It is doubtful that such a broad definition would meet the more stringent requirements which courts impose upon penal statutes. In *United States v. Phisterer*, the Supreme Court defined the term "military station" as meaning "military post," being a place where,

> [T]roops are assembled, where military stores, animate or inanimate are kept or distributed, where military duty is performed or military protection afforded,—where something, in short, more or less closely connected with arms or war is kept or is to be done.[15]

The predecessor of 18 U.S.C. § 1382 was enacted in response to a request by the War Department and the Department of Justice. It was urged as a means of overcoming the problems encountered by military post commanders in attempting to exclude undesirable persons from their posts.[16] The only discussion of this statute[17] was in the House of Representatives, where it was stated that the purposes were to safeguard military secrets[18] and protect soldiers from illicit exploitation.[19] A proposed amendment to have the stat-

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[14] Army Reg. No. 210–10, paras. 1–3 (30 Sep. 1968); Army Reg. No. 310–25, para. 9 (1 Mar. 1969).

[15] 94 U.S. 219, 222 (1877).

[16] H.R. REP. NO. 2, 60th Cong., 1st Sess., pt. 1, at 16 (1908); S. REP. NO. 10, 60th Cong., 1st Sess., pt. 1, at 16 (1908).

[17] There are no records of the hearings held by the Special Joint Committee on the Revision of the Laws, either in the Library of Congress, or in the National Archives.

[18] "[T]he object of this law is to keep out spies, and to keep out people who want to draw maps of forts and arsenals and who want to find out the sort of powder we are compounding. The object is to protect the military secrets of the Government from those in whose possession they might do harm . . . ." 42 CONG. REC. 689 (1908) (remarks of Mr. Williams).

"The reading of it shows that the real purpose was to prevent spies and the like from getting possession of the secrets of the Government, *and not for the enforcement of police regulations.*" *Id.* (emphasis added) (remarks of Mr. Stafford).

[19] "The object of this section has been clearly expressed . . . . It was urged upon the commission by the War Department, not only for the purposes enumerated there, but to protect soldiers from people coming onto the reservation and taking them off to dives and illicit places surrounding the encampments. It was said to be a frequent occurrence that people would come with carriages and conveyances and time after time lure the soldiers away. They could be ordered away, but there was no law to punish them for reentering and constantly returning, and therefore they constantly defied authority by reappearing upon the reservation. Therefore this was recommended in obedience to the request of the War Department." 42 CONG. REC. 689 (1908) (remarks of Mr. Moon of Pennsylvania).

ute include the words "national cemetery" was defeated. It must be concluded that what Congress intended by the term "military installation" was closely akin to the definition given by the Supreme Court in *Phisterer*.

The Judge Advocate General of the Army has held that many facilities which perform a military function would not fall within the protection of this statute. Among these are Recruiting Main Stations,[20] Armed Forces Entrance and Examining Stations,[21] The Pentagon,[22] The Soldiers' Home,[23] and Arlington National Cemetery.[24]

By its terms the statute is applicable within the jurisdiction of the United States. This refers only to general territorial jurisdiction, and not to legislative jurisdiction.[25] The legislative jurisdictional status of land, while of great importance in many areas of the law relating to military installations, has no bearing upon the applicability of the statute. The statute applies to all military installations within the United States, its territories, the Canal Zone, and Puerto Rico.[26]

B. *USAGE OF THE LAND*

Although the jurisdictional status of the land has no bearing on the statute, the purposes for which the land is used are of great importance. The government must establish its ownership or possession of the land involved and prove that it is a military installation within the meaning of the statute.[27] In *United States v. Wat-*

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[20] JAGA 1967/4426 (3 Oct. 1967).

[21] *Id.*

[22] JAGA 1967/3907 (11 May 1967) (supplementary material attached to main opinion and available at the Office of The Judge Advocate General).

[23] JAGA 1953/9537 (7 Dec. 1953).

[24] JAGA 1966/193 (31 May 1966).

[25] The federal government exercises general territorial jurisdiction throughout all of the United States, its territories, and possessions. Legislative jurisdiction, on the other hand, exists only when Congress in some manner has succeeded to the power to enact general, municipal legislation covering a particular tract of land. It is an exercise of complete sovereign power, and is completely independent of ownership or interests in the land. The distinction between these two concepts of jurisdiction is covered generally in DA PAM. 27–164, para. 4.1. A more complete coverage of the subject of jurisdiction, as used herein, may be found in M. Davis, The Acquisition, Acceptance, and Loss of Jurisdiction Over Military Reservations, 1955 (unpublished thesis in the library of The Judge Advocate General's School, U. S. Army). Whenever a section of the United States Code is intended to apply only to those tracts of land over which the federal government exercises legislative jurisdiction, the Code employs the term "Special Maritime and Territorial Jurisdiction." *See* 18 U.S.C. § 7 for a complete definition of this term.

[26] 18 U.S.C. §§ 5, 14 (1964).

[27] United States v. Packard, 236 F. Supp. 585 (N.D. Cal. 1964).

son the court stated, "Obviously too the ownership or possession . . . is an element of the crime charged. . . . Without proof of the requisite ownership or possession of the United States, the crime has not been made out." [28]

Assuming that the requisite ownership or possession has been established, it is still necessary to consider whether there might be certain easements in the tract. Such easements could belong to the individual charged, or to the public at large. If such easements exist, they would be superior, in most instances, to the right of the installation commander to eject or prohibit re-entry.[29] An emergency situation, or one in which the national interest was seriously involved, would probably justify ejecting or barring the re-entry of a person who would otherwise have a right to enter upon the property.[30] But caution and discretion should be employed before relying upon such an assumption, since the courts would doubtless require a showing of true emergency or overriding national interest.

III. INDIVIDUALS INVOLVED

A. *STATUS*

The power of an installation commander to bar individuals from his post is subject to the limitation that his action must not be arbitrary or capricious.[31] Thus, he should not ignore the particular status of the individual he intends to bar, since such status could well be a prime factor in determining the reasonableness of his action. For example, barring a commercial salesman or agent who has violated post regulations governing solicitation on post would raise much less serious questions than barring the child of a serviceman assigned to post quarters.

1. Military Personnel.

Special considerations arise when the individual to be barred is a member of the military services. The installation commander has the power to eject or prohibit the re-entry of military personnel subject only to the limitation that such action may not be taken against any member assigned or attached to his installation.[32] Numerous situations might arise in which it would

[28] 80 F. Supp. 649, 651 (E.D. Va. 1948).
[29] *See* JAGA 1967/4133 (11 Aug. 1967).
[30] *See generally* 14 A.L.R. 2d 78 (1952).
[31] DIG. OPS. JAG 1912, p. 267.
[32] *Id.*

be desirable to bar a member of the military not assigned or attached to an installation.[33]

Members of reserve components are not generally subject to the Uniform Code of Military Justice,[34] and 18 U.S.C. § 1382 may be used to enforce a bar order issued to reservists. However, such individuals are frequently members of reserve units which participate in inactive duty training, and could thus be ordered to accompany their reserve unit to the barring installation for training. In addition, injuries incurred under certain circumstances could result in the reservist becoming entitled to on-post medical treatment or hospitalization.[35] In view of these possibilities, any bar order addressed to a reservist should be carefully tailored to incorporate any necessary exceptions to the basic order.

Retired personnel have a statutory right to certain privileges.[36] In addition, they are normally afforded most of the other privileges available on the installation. The Judge Advocate General has held that those privileges which are granted to them by statute cannot be withheld, unless the reason for such denial bears a reasonable relationship to the use of the particular facility involved.[37] All other privileges are privileges in the true sense of the word, and may be withheld by the installation commander within his discretion.[38]

In the case of any of these privileges, including those based upon statute, strict rules may be imposed upon the exercise of the privilege. Such rules can include prescribing routes to be followed when entering or departing the installation, any reasonable restrictions as to time, place, escort, and other related matters.[39] As in the case of reservists, any bar order addressed to a retired member of the military should be carefully tailored to incorporate any necessary exceptions to the basic order.

2. Dependents.

Whether their sponsor be on active duty or retired, dependents have a statutory right to receive medical care and treatment.[40] The

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[33] *See* JAGA 1968/4061 (28 May 1968).

[34] UNIFORM CODE OF MILITARY JUSTICE art. 2.

[35] 10 U.S.C. §§ 3721, 3723 (1964); 32 U.S.C. §§ 318, 320 (1964); 43 COMP. GEN. 412 (1963); 38 COMP. GEN. 841 (1959); Army Reg. No. 40–3, paras. 8(b) (2), 8(c) (14) (26 Mar. 1962).

[36] 10 U.S.C. § 1074 (1964) (medical care); 10 U.S.C. § 4621 (1964) (commissary).

[37] For example, an individual who has misused his commissary privileges could properly be barred from that facility. For a thorough discussion of situations of this nature see JAGA 1969/4646 (24 Nov. 1969).

[38] JAGA 1969/4646 (24 Nov. 1969).

[39] *Id.*

[40] 10 U.S.C. § 1076 (1964).

denial of such right can only be on the basis of inadequate space, staff, or facilities.[41] The right to commissary privileges, however, belongs solely to the sponsor, and the dependent enjoys such privileges only as the sponsor's agent.[42] However, it is not always desirable to impose a total bar order against dependents, particularly those whose sponsor is on active duty, and deny them the use of commissary, post exchange, or other facilities. Careful thought should be given to the hardships worked. It is not uncommon for such orders to contain limited exceptions.

The installation commander may revoke the assignment to post quarters of any sponsor whose dependents have failed or refused to comply with post regulations.[43] However, there could be many reasons why such extreme action would not be appropriate. So long as the sponsor remains assigned to post quarters, serious doubt arises as to whether the dependent should be barred from the installation. While nothing contained in the statute or regulations prevents the commander from taking this action, the result is illogical and should be avoided.

3. Government Employees.

Employees of the United States Government can be barred from the installation just as any other individual. A conflict arises, however, in the case of installation employees whose jobs are protected under Civil Service or other similar regulations. Such individuals cannot be discharged from employment arbitrarily. A bar order issued to such individuals, therefore, does not terminate their employment, leaving the commander in the uncomfortable position of having an employee who is not performing any duties.

An even more difficult problem arises when the individual involved is a protected employee of another agency of the federal government, such as the Post Office Department. The installation commander does not have the power to initiate discharge proceedings against such individuals, but can only report the circumstances to the appropriate agency for such action as they feel is appropriate. Although a bar order issued to any employee of the federal government would be valid and enforceable, it is usually better to let the employing agency relieve the employee of on-post duties prior to issuing the order, or to issue a limited bar order which would still permit him to perform the duties for which he has been employed.

Similar considerations arise when the person to be barred is an

[41] *Id.*; JAGA 1967/3369 (6 Jan. 1967).
[42] Army Reg. No. 31–200, paras. 11–28 (13 Feb. 1968).
[43] Army Reg. No. 210–14, paras, 15*a*(7), 15*b* (4 Oct. 1963).

employee of the state or local government. No true conflict arises with such individuals since they are not employed by the United States Government. They can be barred from the installation just as can any other individual. However, on many installations the state has retained varying degrees of jurisdiction.[44] In such cases, the commander may be somewhat more restricted as to the actions which he can take.[45] He can impose reasonable restrictions designed to promote good order and discipline on his installation and, in appropriate instances, can bar such individuals. The Judge Advocate General of the Army, in an analogous situation, has taken the position that one should look to the commander's intent at the time the bar order was issued.[46] Following this rationale it could be argued in many instances that the intent was to prohibit re-entry in a *personal* capacity, and that the order would be *suspended* during performance of official duties. Where the state has not reserved a particular jurisdictional right, then no such restrictions would exist.[47]

4. Other Civilians.

Civilians, other than those discussed in the preceding sections, enjoy no special immunities from the installation commander's right to prohibit re-entry, provided his action is neither arbitrary nor capricious.[48] This is so even if the individual barred was gainfully employed on post, whether by a nonappropriated fund activity,[49] a contractor or concessionnaire,[50] or as a salesman or agent for a commercial activity.[51] However, whenever the bar order would have the effect of denying the individual a substantial right, such as gainful employment, special considerations arise.[52] These are discussed more fully later in this comment.

B. *CHANGE OF STATUS*

Where a civilian has been barred from a military installation

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[44] *See* note 25 *supra*.

[45] Where the state had reserved the right to serve civil and criminal process, it was held that the installation commander must permit entry for such purposes, subject only to reasonable restrictions designed to promote good order and military discipline. JAGA 1957/7093 (29 Aug. 1957).

[46] JAGA 1968/4061 (1 Jul. 1968).

[47] JAGA 1955/4865 (13 May 1955).

[48] Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961).

[49] JAGA 1969/3517 (20 Feb. 1969). *But cf.*, Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

[50] Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961).

[51] JAGA 1966/4013 (10 Jun. 1966); JAGA 1954/7567 (14 Sep. 1954); JAGA 1954/3606 (6 Apr. 1954).

[52] *See* Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

and has subsequently been ordered to active duty, The Judge Advocate General of the Army has taken the position that the original bar order must be re-examined as if it were now being issued to an active duty member of the military services for the first time.[53] Using this analysis, a change of status could cause an automatic suspension of the prior bar order.

Similar considerations arise when an individual's status changes as a result of marriage. Although there have been no opinions rendered as to what effect such a change of status would have, it is reasonable to anticipate that it would be resolved in much the same manner as when the change is from civilian to military. As noted, dependents of military personnel, both active duty and retired, are entitled by statute to medical care. A bar order which was valid and effective when issued would be subject to the same objections previously discussed, once the individual barred became a military dependent.

IV. LAW OR LAWFUL REGULATION

A. *SCOPE*

Under the powers granted to it by the Constitution,[54] Congress has provided that the Secretary of the Army shall have the authority to conduct all affairs of the Department of the Army, to include "functions necessary or appropriate for the . . . welfare, preparedness, and effectiveness of the Army."[55] The Supreme Court has stated that, "The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President."[56]

The Secretary of the Army has issued regulations which, in total effect, charge the installation commander with the responsibility of monitoring and controlling all visitors to his installation.[57] In view of this, there can be no question but that the term "law or lawful regulation" as employed in this section, includes all federal law and all lawful military regulations.[58]

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[53] JAGA 1968/4061 (1 Jul. 1968).
[54] U.S. CONST. art. I, § 8.
[55] 10 U.S.C. § 3012 (1964).
[56] Cafeteria Workers Union v. McElroy, 367 U.S. 886, 890 (1961).
[57] Army Reg. No. 210–7 (10 Jun. 1966); Army Reg. No. 210–10, paras. 1–15 (30 Sep. 1968); Army Reg. No. 380–25 (17 May 1965); Army Reg. No. 633–1, para. 8 (13 Sep. 1962).
[58] *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943).

The answer is far less certain, however, when one questions whether laws or regulations other than those mentioned above might be included within the meaning of this section. Congress has the power to adopt the laws of the states or their political subdivisions, and once adopted they become federal law.[59] But there is no indication that Congress intended to include any law or regulations other than federal within the meaning of this statute, and it is the accepted view that only federal laws or regulations would apply.

As originally enacted, this statute used the words "prohibited by law or *military* regulation made in pursuance of law"[60] (emphasis added). Thus, it is clear that Congress originally intended to include only military regulations. As presently worded, the term "military" no longer appears. It is reasonable to assume that it was intended to enlarge the original statute so as to bring all federal regulations within the scope of its coverage. No decisions or opinions have yet been rendered on this question, but it would appear that entering a military installation for any purpose prohibited by a lawful regulation issued by any agency of the United States would be punishable under the first paragraph of the statute.

B. *THE LAWFUL REGULATION*

1. Definition.

A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, lawful orders of a superior, or beyond the authority of the official issuing it.[61] Of course, the Army cannot promulgate a regulation the mere violation of which by a person not subject to miliary law is punishable as a crime.[62] But the effect of this section is to make such regulations enforceable, to a limited extent, by imposing federal penal sanctions upon civilians who enter upon a military installation for any purpose which these regulations proscribe.

2. Constitutionality.

There have recently been numerous instances in which individuals have claimed that charges against them under this statute

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[59] United States v. Sharpnack, 355 U.S. 286 (1958); Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

[60] Act of March 4, 1909, ch. 321, § 45, 35 Stat. 1097.

[61] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para, 171*a*. *See also* Standard Oil v. Johnson, 316 U.S. 481 (1942); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83, 95 (1954).

[62] JAGA 1963/3678 (8 Mar. 1963), *as digested in* 63 JALS 125/11.

were in violation of their protected rights under the first amendment.[63] In *United States v. Bradley*, the question raised was whether a post regulation prohibiting picketing, demonstrations, sit-ins, protest marches, political speeches, and similar activities, would be an unwarranted violation of rights protected under the Constitution.[64] Although the conviction was reversed without reaching the constitutional question, the court said, "Without reaching the merits, we recognize that at the very least, appellant's constitutional arguments are far from frivolous." [65]

It can be anticipated that protest movements and similar activities, which have gained such momentum throughout the nation in the past few years, will result in an increasing number of such challenges being raised.[66] The installation commander has traditionally enjoyed a relatively unrestricted power to prohibit such activities on post, but the standards which were applied in past years are no longer fully applicable. And so we now find that a member of the Air Force can bring an action in a federal court for injunction and declaratory relief, alleging that a regulation which prohibits him from wearing his uniform to an off-post "protest" meeting, is a violation of his rights under the first amendment. In this case, *Locks v. Laird*, although the action was dismissed, the court went on to say, "Were we at peace and not engaged in a 'war' in Southeast Asia, time and circumstances might cause us to seriously question the constitutionality of the regulation under review."[67] One is led to the conclusion that first amendment rights will become increasingly important in balancing the rights of individuals vis-a-vis the military.[68]

The fourth and fifth amendments are particularly relevant as

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[63] *E.g.*, Weissman v. United States, 387 F.2d 271 (10th Cir. 1967); JAGL 1969/10010–X (22 May 1969).

[64] 418 F.2d 688, 689 (4th Cir. 1969).

[65] *Id.* at 691.

[66] *See* JAGL 1967/9972–G (8 Aug. 1967), which discusses the cautious attitude adopted by the Department of Justice relative to prosecutions under this section of persons involved in demonstrations.

[67] 300 F. Supp. 915, 919 (N.D. Cal. 1969).

[68] We should in these times be mindful that to the extent we secure legitimate and orderly access to means of communication for all views, we create conditions in which there is no incentive to resort to more disruptive conduct." Wolan v. Port of New York Authority, 392 F.2d 83, 93 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968). "Lincoln once asked, '[is] it possible to lose the nation and yet preserve the Constitution?' His rhetorical question called for a negative answer no less than its corollary: 'Is it possible to lose the Constitution and yet preserve the Nation?' Our Constitution and Nation are one. Neither can exist without the other. It is with this thought in mind that we should gauge the claims of those who would assert that national security requires what our Constitution appears to condemn." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 183, 200 (1962).

applied to search or apprehension of civilians charged with a violation of the statute, and to the due process and equal protection problems which could arise in certain situations under the first paragraph of the statute.[69] Assuming that the regulation issued by an installation commander is lawful, what problems could arise in prosecuting an individual who had entered the post for a purpose which that regulation prohibits? Under certain circumstances, before a member of the military service can be convicted by a court-martial of violating a post regulation, there must be proof that he had actual knowledge of that regulation.[70] By contrast, the first paragraph of 18 U.S.C. § 1382 (the provision under which a civilian violator would be tried) contains no words indicating that knowledge would be an element of the offense. Therefore, the issue could be raised that an unknowing civilian should not be held criminally responsible for the violation of a regulation, when a member of the military services, in like circumstances, would be excused.

This same issue could be raised even more forcefully if the regulation in question was one which contained restrictions or prohibitions which the average civilian would not readily have anticipated. In *Lambert v. California*,[71] the defendant was convicted of failing to register as required by a Los Angeles city ordinance which made it unlawful for any person previously convicted of a felony to remain in that city for more than five days without registering with the police. In speaking for the majority, Mr. Justice Douglas said, "Actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand."[72] In its simplest terms, ignorance of the law, in some cases, can be an excuse.

No cases or opinions have yet addressed themselves to these due process and equal protections problems. Probably, common sense enforcement of § 1382 will keep the issues from being litigated. However, they do illustrate the problems in alleging an offense under the first paragraph of the statute in the absence of proof of knowledge of the regulation involved.

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[69] For an excellent discussion of the problems of apprehension and search of civilians by the military, *see* Hamel, *Military Search and Seizure—Probable Cause Requirement*, 39 MIL. L. REV. 41 (1968). For more general information, *see* Department of Justice, Manual on the Law of Search and Seizure (1967).

[70] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para. 171*b*.

[71] 355 U.S. 225 (1957).

[72] *Id.* at 229.

V. THE EFFECTIVE REMOVAL OR BAR ORDER

A. *THE COMMANDER'S DECISION*

As has been noted, the clearly effective removal or bar order is one issued by, or at the direction of, the commanding officer. Orders issued by other officers will invariably threaten the success of a § 1382 prosecution. But there can be situations in which it is simply not possible to secure the commander's decision before such action is taken. It might also be desirable, under some circumstances, to issue a bar order as soon as an individual is apprehended for the violation of a regulation. It is more convenient to issue such an order immediately, and then eject the individual from the installation. Several installations presently employ this method. The authority to issue such orders has been specifically delegated by the installation commander, who then ratifies each such order after it has been issued.[73] The questionable validity of this procedure. however, suggests it should be employed only when unusual circumstances make it virtually impossible to secure the commander's decision prior to issuance of the order.

Several installations have also adopted a policy of issuing a bar order to all individuals separated from the military service with a punitive or undesirable discharge. This is a more common example of a situation where the commander neither makes the decision in each case nor signs the order himself. However, this is not a case of delegated authority to make the decision, but merely a determination in advance that a particular factual situation is one in which he desires such an order to be issued. Thus, the person signing the order is only performing a clerical task, and the procedure used is probably valid. Since the individual separated was entitled to a full hearing and representation by counsel, there is a valid factual basis upon which the order was issued. In other instances it would be unwise to attempt to use such blanket authority.

B. *EVALUATION OF HARM*

A § 1382 prosecution may frequently turn upon a determination of whether, under the circumstances, the order was reasonable and not arbitrary or capricious. In *Cafeteria Workers v. McElroy* the Supreme Court said,

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[73] See appendix B for results of a questionnaire sent to Staff Judge Advocates at CONUS installations.

> We may assume that [she] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist.[74]

In August of 1970, the Seventh Circuit, on a petition for rehearing en banc, held that a bar order which resulted in plaintiff being discharged from her employment with an on-post credit union was a violation of her rights under the first amendment. In this case, *Kiiskila v. Nichols*,[75] the plaintiff, during a casual conversation on post, had mentioned an anti-Vietnam war rally which was to be held in Chicago. The following day. while off-post, she had distributed literature concerning this rally. That evening, upon entering the installation, her vehicle was stopped and searched and about fifty pounds of anti-war literature was found in the trunk. From this evidence the installation commander concluded that plaintiff would attempt to distribute this literature on post in violation of a post regulation similar to the one involved in *Bradley*. He thereupon issued a permanent bar order, as a result of which plaintiff was no longer able to continue in her employment. The court noted that "the exclusion order in this case is essentially equivalent to dismissal of a person from government employment." [76] After stating that "constitutional guarantees of free speech and association do not permit the government to forbid or proscribe speech or other protected conduct unless that conduct is directed to inciting or producing imminent lawless action," [77] the court held that the evidence gave rise to a nearly conclusive inference that plaintiff never intended to violate the regulation.[78]

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[74] 367 U.S. 886, 898 (1961).

[75] Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

[76] *Id.* at 748.

[77] *Id.* at 751.

[78] There seems to be a developing trend towards requiring some type of hearing in cases of this nature. It is still too early to tell whether such hearings will, in fact, become necessary, and if so under what conditions. The closest case to date is Kiiskila. Although the court did not decide this question, they did state in dicta, "We are not convinced that the *Cafeteria Workers* case necessarily compels the conclusion that Colonel Nichols was empowered to exclude plaintiff from Fort Sheridan without a hearing and that the absence of a hearing comports with due process under the fifth amendment." 433 F.2d at 747. It may well be that the Seventh Circuit has misinterpreted the Supreme Court's views in *Cafeteria Workers*, for their comment in footnote 1 that "absent explicit authorization, a military commander may not exclude a civilian employee from a military installation without a hearing," does not appear to be supported by either of the cases cited as authority. Until this area of the law has developed further, the recommended elements for a bar letter set out in appendix A should prove satisfactory, since they require that the individual being barred be advised both as to the reason for the bar and of his right to submit a rebuttal.

Since the *reason* for the order is likely to be raised, the retained files should contain a full disclosure of all pertinent facts leading to the order, evidence that these facts were made known to the commander, and evidence that his decision was arrived at independently. This does not preclude recommendations by members of his staff, so long as the final decision is his alone. Any facts reported to him, and upon which he has based the order not to re-enter, are privileged and not subject to an action for libel, even if actual malice could be shown.[79]

C. *IDENTIFICATION OF THE INDIVIDUAL*

In most instances there will be no difficulty identifying the individual to whom the bar order is to be issued. He is usually quite willing to identify himself. However, there may be occasions on which an individual refuses to identify himself in any way. This raises the problem of being able to prove that the order was actually issued to this individual. There is no simple solution to this problem! There is a great divergence of opinion as to what methods should be used, and under what circumstances.[80]

A search of the individual, if incident to a lawful arrest, would be acceptable. But if it is accomplished by military police, it requires that a felony or a misdemeanor amounting to a breach of the peace must have been committed in their presence and would be lawful only as a "citizen's arrest." [81]

If no other method will suffice, then the individual may be photographed and fingerprinted over his objections.[82] In such cases, there should be prior coordination with the staff judge advocate of the next higher headquarters and with the local United States attorney.

D. *APPEARANCE BEFORE A MAGISTRATE*

Violations of § 1382 are "petty offenses" within the meaning of the United States Code,[83] and may be tried before a United States Magistrate with the express consent of the accused. Although by agreeing to trial before a Magistrate the accused waives his right to trial by jury[84] and may subsequently appeal only errors of law apparent in the record,[85] the great majority of all such cases are

[79] Brown v. Coen, 209 F. Supp. 56 (D. Alaska 1962).
[80] *See* appendix B.
[81] DA PAM. 27–164, para. 11.3.
[82] JAGL 1969/10010–X (22 May 1969).
[83] 18 U.S.C. § 3401 (Supp. IV 1968).
[84] United States v. Bishop, 261 F. Supp. 969 (N.D. Cal. 1966).
[85] United States v. Chestnut, 259 F. Supp. 460 (E.D.N.C. 1966).

tried before a Magistrate. There are only nine reported cases in which convictions under this section, including those originally tried before a Magistrate, have ever gone to a higher level.[86]

VI. CONCLUSION

There is a great divergence of opinion as to what matters should properly be considered prior to issuing an order not to re-enter. With such a lack of uniformity presently existing, more definitive guidance from the Department of the Army is badly needed. Until such guidance is forthcoming, the recommended elements for a bar letter contained in appendix A should be careully examined by staff judge advocates before recommending that a bar order be issued.

The cases in which the rights of individuals have been balanced against the needs of the military services indicate that courts are moving towards construing the needs of the military services ever more narrowly. Many installations use a standardized bar letter with inflexible wording. While this is satisfactory in the great majority of situations, more care should be given to tailoring the order to meet the facts. Where the individual has a statutory right to certain privileges or facilities, the order should specifically exclude these from the general bar. Greater use should be made of the limited bar order in appropriate circumstances.

Present indications are that the military services will be faced with an increasing number of instances in which the validity of bar orders will be challenged in the federal courts. By careful use of such orders not to re-enter, such challenges will be unsuccessful.

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[86] Canal Zone v. Brooks, 427 F.2d 346 (5th Cir. 1970); United States v. Bradley, 418 F.2d 688 (4th Cir. 1969); United States v. Jelinski, 411 F.2d 476 (5th Cir. 1969), *cert. denied*, 396 U.S. 943 (1969); Weissman v. United States, 387 F.2d 271 (10th Cir. 1967); United States v. Holdridge, 282 F.2d 302 (8th Cir. 1960); United States v. Ramirez Seijo, 281 F. Supp. 708 (D.C. P.R. 1968); United States v. Chestnut, 259 F. Supp. 460 (E.D.N.C. 1966); United States v. Packard, 236 F. Supp. 585 (N.D. Cal 1964); United States v Watson, 80 F. Supp. 649 (E.D. Va. 1948).

APPENDIX A

RECOMMENDED ELEMENTS OF A BAR LETTER

1. Format.

The bar letter should be in the form of a military letter. This form provides for the use of a "subject" line in the heading. It also provides for the use of a "command" line, to be used in those cases in which the commander cannot personally sign the letter.

2. Subject.

The subject of the letter should be as clear and concise as possible.

3. Addressee.

The letter should be addressed to the person to whom the order is directed, using complete name and address when possible. Each letter should be addressed to but one individual, since proof of delivery is a necessary prerequisite to an effective bar. The use of the fictitious names "John Doe" or "Jane Doe" is permissible whenever it has been impossible to identify the individual to whom the order is directed. In such cases, a paragraph should be included within the body of the letter identifying the individual to the greatest extent possible. The retained copy of such letters should also contain a detailed explanation of the circumstances together with any additional identifying data, such as photographs or fingerprint cards.

4. The Order.

The first paragraph of the letter should contain a clear and concise statement of the order not to re-enter. The time at which the order becomes effective should be stated, but cannot be prior to its receipt by the addressee. This paragraph should read substantially as follows:

> You are hereby notified that, effective upon your receipt of this letter, you are ordered not to reenter, or be found within the limits of, the United States military reservation at Fort Trouble, Missouri.

5. Reasons.

The second paragraph of the letter should set forth the reasons why this action is being taken. It is not necessary to go into great detail but it should, as a minimum, include the following:

a. *Who.* State whether it was the individual addressee alone, or in combination with others.

b. *What.* A statement of what he did, or failed to do, that caused this action to be taken.

c. *Where.* Identify as precisely as possible the exact place or places at which the act or omission occurred.

d. *When.* State the time or times at which the act or omission occurred. If it has occurred over a period of time, identify the period involved as closely as possible.

e. *Why.* Explain why the act or omission has resulted in this order being issued. If it was in violation of a law or regulation, identify the law or regulation involved. If it was conduct which in some other way tended to interfere with the good order and discipline of the installation, then so state.

6. Exceptions.

This paragraph need be used only if there are circumstances which require certain exceptions to the order or if the commander in his discretion, desires to provide for exceptions. Examples of some typical exceptions are—

a. It has been brought to my attention that you are a retired member of the military service. As such you are entitled, as a matter of law, to the use of medical and commissary facilities, provided they are reasonably available. Therefore, as a limited exception to the order in paragraph 1, you have the right to use the medical and commissary facilities on this installation.

b. It has been brought to my attention that you are the dependent wife of an active member of the military services. In order to minimize any hardship upon your sponsor I hereby grant you the right, as a limited exception to the order in paragraph 1, to use the medical, commissary, and post exchange facilities on this installation.

c. It has been brought to my attention that you are presently working upon this installation as an employee of the Post Office Department. So as not to cause undue interference with your present employment, as a limited exception to the order in paragraph 1, you may enter and remain upon this installation, but only under the conditions hereinafter set forth:

(1) You may enter and depart the installation only at Gate number 2.

(2) You will proceed directly to and from the Post Office branch at which you are employed by using King Road. You may not loiter nor delay on King Road, nor may you deviate from this road for any reason whatsoever.

(3) You may perform such duties upon this installation as are assigned to you by your superiors, provided that such duties are

in the official performance of your obligations as an employee of the Post Office Department.

(4) You are expressly prohibited from entering, remaining upon, or engaging in any activities upon this installation, other than those set forth above.

d. Highway 31 is a public thoroughfare which traverses this installation. It is not my intention to deny you the right to use Highway 31 for purposes of traversing the installation. However, you are not to deviate from this road in any way nor enter upon any other part of this installation for any purpose whatsoever.

Reasonable limitations may be placed upon most of the exceptions which a commander may grant. Use of facilities on post, whether based upon a right granted by statute or not, may be further conditioned by limiting the routes which may be used, or the times during which the exception will apply. It is doubtful that a time limitation would be valid as to the use of a public thoroughfare. Where the use of medical facilities is involved, it should be clearly stated that such facilities are available at any time in case of an emergency.

7. *Reconsideration.*

The letter should contain a paragraph which provides for reconsideration. This establishes an administrative remedy procedure, and could well preclude the individual from pursuing any court action until such procedures have been complied with. This paragraph should be worded substantially as follows:

Should any compelling reasons exist which you believe would be sufficient to justify a modification or termination of this order, you should submit such request to this Headquarters, ATTN: Provost Marshal, for my consideration.

8. *Termination.*

If this order is for a particular period of time only, rather than indefinite in nature, then a statement to that effect must be included. It may be combined with the paragraph on reconsideration. It should state clearly whether the order terminates automatically upon the expiration of the period of time involved, or whether the addressee must apply for its withdrawal upon expiration of the period, for good cause shown.

9. *Notice of Statute.*

The letter should always contain the following notice of statute: Title 18 of the United States Code, Section 1382, states as follows:

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard,

> station, or installation, for any purpose prohibited by law or lawful regulation; or
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

10. *Action Upon Violation.*

The last paragraph of the letter should put the addressee on notice as to what actions might be taken should the order be violated. This paragraph should be worded substantially as follows:

> You are further informed that should you re-enter or be found upon the limits of the United States military reservation at Fort Trouble, Missouri, in violation of this order, you will be subject to apprehension and detainment by the military for prompt delivery to appropriate civil authorities.

11. *Notice of Delivery.*

The file copy of the letter should contain a notice of delivery. If possible, it should be an acknowledgement of receipt, signed by the addressee, showing the date and time received. Where this is not possible, or the addressee refuses to sign, then a similar statement should be signed by the person who delivered the order.

APPENDIX B

SURVEY OF CONUS INSTALLATION STAFF JUDGE ADVOCATES

A questionnaire was mailed to the Staff Judge Advocates at 49 CONUS installations. Replies were received from 43.

QUESTIONNAIRE

The following eight questions pertain to a bar letter issued by an installation commander pursuant to his authority under AR 210–10, and other pertinent regulations, for the violation of which criminal sanctions under 18 U.S.C. § 1382 could be invoked:

1. Do you believe that a bar letter should set forth in full the reasons why the installation commander has taken this action?

Twenty-three (53%) felt that the reasons should always be set forth in full. Sixteen (37%) stated that the reasons should *sometimes* be stated, and three (7%) indicated that reasons should never be given. One respondent did not reply to this question. The comments of those who stated that reasons should sometimes be given indicate that they were concerned about the words "in full" as used in the questionnaire. Most of them felt that general reasons should be stated, but not in full detail. The three respondents who felt that reasons should never be given felt that it was unwise to declare your reasons in advance, and that such questions should be answered if and when the addressee brought a court action. One respondent indicated that his installation employed mimeographed form letters which already contain the commander's signature. They are issued by the Provost Marshal and later ratified by the commander.

2. Do you believe that a bar letter should be signed personally by the installation commander, rather than by some other officer to whom this authority has been delegated?

Twenty-four (56%) felt that the bar letter should be signed by the commander. Eleven (26%) felt that he should sign the ones which were likely to cause future trouble. Many of these replies were from installations which regularly issue bar letters to all

persons separated from the military service with a punitive or undesirable discharge, and they felt that the commander's signature was not required in these cases. Seven (16%) felt that only the decision had to be made by the commander, and that the letter should be signed by the Chief of Staff, Deputy Post Commander, Provost Marshal, or Adjutant General. One respondent did not reply to this question.

3. Do you believe that a bar letter should indicate clearly the office to which any appeal or request for reconsideration is to be addressed?

Fourteen (33%) replied in the affirmative, eighteen (42%) replied in the negative, and ten (23%) qualified their answers. One respondent did not reply to this question. Those who gave affirmative replies generally felt that such information in the bar letter would discourage direct appeals to the courts. Those who gave negative replies gave such reasons as, "Don't make more work for yourself," "Let the wrongdoer figure this out for himself," and "There *is* no appeal!"

4. It is possible for a bar letter to be issued to a retired service member, or dependent of a retired or active duty service member. Such individuals may have a statutory right to certain services, such as military hospitals. Do you believe that a bar letter, in such instances, should spell out in detail the areas and facilities which are *not* included within the bar?

Twenty-seven (63%) replied in the affirmative, two (5%) replied in the negative, and twelve (28%) qualified their answers. Those who replied in the negative or with qualified answers gave such reasons as, "Let them go elsewhere to receive their privileges," "Our purpose is to put a scare into them . . . so we don't make concessions," and "If they want to use these facilities, let them ask for it." One respondent noted that they may still be barred for cause, even from statutory privileges. Two respondents felt that such individuals did not have any statutory rights which were superior to the right of the commander to deny re-entry. Two respondents did not reply to this question.

5. Do you believe that a bar letter should be made effective "until revoked," rather than for some stated period of time such as one year?

Nineteen (44%) favored the indefinite bar, three (7%) favored a bar for a stated period of time only, and eighteen (42%) felt that each had its proper place, depending upon the circumstances.

Those who opposed the indefinite bar did not state their reasons. Those who favored it gave such reasons as, "Place the burden on the individual to request permission to re-enter" and "It is much simpler from an administrative position." Three respondents did not reply to this question.

6. Many installations have a major highway or other public thoroughfare which traverses the installation. It has been held that a bar letter might be ineffective as to an individual's right to use such thoroughfare (U.S. v. Watson, 80 F. Supp. 649 (1948)). Under similar circumstances, do you believe that a bar letter should spell out in detail the areas or thoroughfares which are *not* included within the bar?

Twenty-one (49%) felt that such excepted areas should always be specified, six (14%) felt that such statements should *not* be included, and ten (23%) were uncertain. Six respondents did not reply to this question. Of the twenty-one respondents who replied in the affirmative to this question, the principal comments were, "Always issue an order which means just what it says" and "Don't create the impression that you have the power to do what you cannot." Of the ten who gave qualified replies, the main concerns were that it was too difficult to describe all such areas, and that as long as the military police knew the difference, why not let the individual think he was barred in toto. Of the six who replied in the negative, the major comments were, "To do so is an invitation to re-enter the post" and "This is a problem for his civilian lawyer to solve!"

7. Do you maintain a complete list of all individuals who are currently barred from your installation?

Thirty-nine (91%) stated that such records were maintained, three (7%) stated that they were not, and one respondent did not reply to this question. Of the thirty-nine who replied affirmatively, sixteen indicated the records were maintained by the Provost Marshal, one specified the Adjutant General, and the remaining twenty-two did not specify. Of the three who gave a negative response, no comments were furnished, and it is not possible to determine if their replies really meant that no such records were maintained, or merely that they were not maintained by the staff judge advocate. One respondent indicated that the Provost Marshal on that installation had records of such bar orders dating back to 1937.

8. Many members of protest groups have refused to identify themselves when they are being removed from the installation. When-

ever a situation such as this occurs, what methods of identification do you feel should be used for purposes of issuing a bar letter?

a. Search of the person for proper identification?
b. "Mug" type photographs?
c. Fingerprints?
d. Other (please explain)?

Replies are difficult to correlate, since most of them were qualified and inconclusive. Twenty-nine respondents (67%) felt that the use of photographs was permissible. Twenty-one (49%) felt that fingerprints could be taken. Eleven (26%) felt that any or all of these methods could be employed freely. Two respondents felt that all of these methods were illegal, and eight respondents did not reply to the question. Most of those who favored searching the individual seemed to have assumed that probable cause existed. Thirty-one respondents (72%) felt that federal or local police authorities should be called upon to make the identification. Several respondents felt that this "poses an interesting problem!"

The following questions are based upon a review of your past experience. I would like to be able to acquire data for the past five years, if at all possible. Please insert below the number of past years to which the answers to the following three questions apply: Number of years _____

9. How many bar letters have been issued by the commander of your installation during this period?

Eleven respondents (26%) stated that they had no record of a bar order ever having been issued by their installation. Twenty-nine respondents (67%) reported figures varying from an average of less than one per year to a high of about 300 per year. Three respondents did not reply to this question. One respondent reported 523 such orders issued within a two-year period, of which 424 were issued to military personnel separated with a punitive or undesirable discharge. The larger installations generally reported more frequent use of such orders.

10. How many times have such bars been violated?

Thirteen respondents (30%) reported one or more violations within the past five years. Twenty-seven (63%) had no record of any past violations, and three did not reply to this question. Those respondents reporting violations ranged from one during the past five years to a high of 45 in one year.

11. How many such violations have been referred for trial?

Seven respondents (16%) reported trials by a United States

Commissioner (presently called Magistrate) or by a Federal District Court. The highest of these was a respondent who reported 26 trials before a Commissioner in a single year. Three respondents did not reply to this question, and the remaining thirty-three respondents either did not have any violations during the period or had no records of what action was taken.

THE GERMAN NARCOTICS LAW*

By Captain Thomas M. Zimmer**

I. INTRODUCTION

Until recently, the use of narcotics, drugs, marihuana and hashish has not been considered a great problem in the Federal Republic of Germany. In 1966 an official of the Bundeskriminalamt, the Federal Criminal Office, could say that German youth were completely free of narcotics. Another police official in Bavaria went so far as to say that marihuana simply did not correspond to European tastes. However, by the summer of 1969, scarcely a day went by without reports in the press about pot parties, police raids, smuggling rings and court cases. Since 1966, the number of persons arrested for narcotics violations has increased more than fourfold, the number of prosecutions more than doubled, and the amount of marihuana and hashish confiscated increased over tenfold. While the use of hard narcotics and drugs is not yet widespread in Germany, many German officials, like their counterparts in the United States, are now openly concerned about the widespread use of marihuana and hashish.[1]

The American serviceman or member of the civilian component in Germany, and his dependents, just as in many other parts of the world, are now exposed to the temptation of easy and inexpensive acquisition of marihuana and other drugs. Often they succumb,[2] and in many cases, depending on the facts and circum-

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] *Die Haschisch Welle*, DER SPIEGEL, 10 Nov. 1969, No. 46. For a recent statement of the federal government which points out the change of attitude that has taken place *see* Informationen des Bundesministeriums fuer Jugend, Familie, und Gesundheit, *Aktionsprogram der Bundesregierung zur Bekaempfung des Drogen- und Rauschmittelmissbrauchs*, 12 Nov. 1970.

[2] Statistics released in January 1970 by the Department of Defense show an over tenfold increase in the number of United States Army, Europe, soldiers found using, possessing, selling or transferring marihuana over the past three years. A steady upward trend in the number of Air Force and Navy personnel in Europe involved in drug offenses was also revealed.

stances, they subject themselves to prosecution by German authorities in accordance with Article VII of the NATO Status of Forces Agreement and the Supplementary Agreement to the Status of Forces Agreement in effect in the Federal Republic of Germany. When such a situation arises, judge advocates are called upon to give advice on the German narcotics law and to perform effective liaison with German authorities. The following discussion of the German narcotics law and its application should provide the reader with sufficient background to perform these functions.

II. THE OPIUMGESETZ: BASIC PROVISIONS

The German narcotics law—the Opiumgesetz[3] as it is popularly known in German—dates from 1929.[4] It was amended in 1934 and has remained unchanged since then. Section 1, paragraph I, enumerates those substances and preparations which are covered. The list is rather extensive and is often phrased in complex chemical terms which are confusing to the attorney. Nevertheless, at the risk of oversimplification, the following short summary of those drugs and preparations covered can be made: (a) opium, coca leaves, cocaine; (b) morphine, heroin; (c) specific synthetic narcotics; (d) codein; (e) salts of all of the above; and (f) Indian hemp (hashish and marihuana).[5]

In recognition of increasing scientific progress, the drafters of the law provided in Section 1, parapragh II, that an implementing regulation may, by decree of the government, extend the provisions of the Opiumgesetz to substances and preparations which according to scientific research have the same damaging effects as those listed in the statute. Thus, to determine if a certain substance or preparation is covered by the law, the implementing regulations, as well as the Opiumgesetz itself must be consulted. This extension has been implemented four times to date, the last time to include, among others, LSD and mescaline. The Opiumgesetz thus covers most of the substances and preparations which are considered to be dangerous in the United States. However, since

[3] Law Concerning the Trade with Narcotics (Gesetz uber den Verkehr mit Betraeubungsmitteln), 10 Dec. 1929 (Law Gazette of the Reich I 215, Federal Law Gazette III 2121–6). For complete translation of the law, consult Annex A.

[4] The literature concerning the Opiumgesetz is sparse, even in German. *See*, Anselmino and Hamburger, OPIUMGESETX (1934); Bundeskriminalamt, BEKAEMPFUNG VON RAUSCHGIFT DELIKTEN (1956); Erbs, STRAFRECHTLICHE NEBENGESETZE (1957); Lewin and Goldbaum, OPIUMGESETZ (1931); Stenglein, KOMMENTARE ZU ERGAENZUNGSBAND (1933).

[5] For a complete listing consult Annex A.

any specific new substance or preparation can only be brought under the provisions of the law by an implementing regulation, some of the newer hallucinatory drugs may not be covered.

The general purpose of the Opiumgesetz is not to prevent absolutely the use of the substances and preparations covered by the law, but rather to prevent their misuse and abuse. It therefore provides in Section 3, paragraph I, that a license may be obtained for: (1) import or export (Einfuhr and Ausfuhr); (2) extraction (Gewinnung); (3) production or manufacture for the purpose of putting into trade for profit (gewerbemaessige Herstellung und Verarbeitung); (4) trading (der Handel mit ihnen); (5) acquisition (Erwerb); (6) delivery or dispensing (Abgade); (7) sale (Verkauf); and (8) engaging in any similar trade (jede sonstige gleichartige Verkehr mit ihnen).

The sanction for engaging in any of the activities listed above without first obtaining a license is set out in Section 10, paragraph I, which will be examined in detail later. Section 3 would seem to make it compulsory to obtain a license for any conceivable type of dealing with a proscribed substance or preparation. However, as extensive as the requirement of Section 3 first seems, upon close examination it does not appear necessary to obtain a license in order to produce one of the proscribed substances or preparations in the home for personal consumption. Only when a substance is dealt with in a manner listed in Section 3. paragraph I, is it necessary to obtain a license.[6]

The extent of the licensing provision of Section 3 thus leaves a gap. This gap is partially closed by Section 9, which strictly prohibits the import, transit, export and production of opium, resi-

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[6] An exemption from the compulsory licensing provision is found in paragraph IV of Section 3, which provides that pharmacies do not need a license for acquisition and manufacture, as well as for deliveries, of drugs based upon the prescriptions of physicians, dentists or veterinarians. Nor is it necessary for persons to obtain a license in order to acquire such drugs on the basis of a prescription. However, the pharmacy must have a license to do business as a pharmacy and, pursuant to the Law Concerning the Prescription and Sale of Drugs, specified drugs may be obtained only through such pharmacies and upon prescription of a physician. The prescription of drugs is permitted only to the extent that it is medically justified by the examining physician in accordance with recognized rules of medical science. The person who obtains a prescription for substances listed in the Opiumgesetz through fraud or who falsifies a prescription is treated the same as one who obtains the substances without a license. The use of a prescription not issued in conformance with the Law Concerning Prescription and Sale of Drugs does not bring one within the exemption of paragraph IV. In addition, under certain circumstances, doctors who negligently issue prescriptions for medically unfounded reasons and pharmacists who negligently fail to examine a prescription for authenticity may also violate the Opiumgesetz.

dues of opium used for smoking, of the resin obtained from hemp and preparations of this resin, especially hashish, as well as the trade with such drugs. As regards Section 9, it should be noted that the prohibition is an absolute one and that the production prohibited need not be done for purposes of putting a substance into trade for profit. Mere production is prohibited. However, Section 9 is applicable only to opium and hemp and their derivatives. That closes the gap somewhat, but the question of the basement production of LSD for personal consumption still remains. This question will be treated in the discussion of Section 10, to which we shall now turn.[7]

Section 10 of the Opiumgesetz contains the penal provisions. Any person who violates the provisions of the Section may be sentenced to imprisonment up to three years and/or fined. The amount of the fine is set out in Section 27 of the Criminal Code[8] and provides for the imposition of a fine of between DM5 and DM10,000.[9] If the offense constitutes an attempt to profit, as is often the case in narcotic offenses, the fine can be increased to DM100,000. In setting the fine. the court is to observe the economic situation of the defendant; however, the fine must exceed the compensation received for the act and the profit derived from it. The statutory maximum of DM100,000 can also be exceeded, according to Section 27, if the profits illegally derived are more than DM100,000.

Section 10 of the Opiumgesetz, in paragraph I, subparagraphs 1 to 9, enumerates those acts which are punishable. Paragraph I(1) prohibits the commission of specified acts without the license provided for in Section 3. Paragraph I(1), however, contains a coverage which is broader than that of Section 3. Thus certain acts, for which one need not obtain a license under Section 3, are made punishable. The key phrases in Section 3 and in paragraph I(1) of Section 10 do not easily translate into English. In Section 3, as concerns the drugs and preparations covered by the law, it is necessary to obtain a license for trading with them (der Handel mit ihnen). To come within the terms of Section 3, one must actually physically engage in trade. The concept of paragraph I(1) of Section 10, known in German as "Handeltreiben," is broader and cannot be exactly translated. It is a legal concept which has been explained by the Bundesgerichtshof, the German

[7] For an excellent discussion of Section 10 and other aspects of the Opiumgesetz, *see* Stangl, *Rauschgiftstrafrecht* in BEKAEMPFUNG VON RAUSCHGIFT DELIKTEN, *supra* note 4.

[8] StGB § 27 (Beck 1970).

[9] One U. S. dollar equals 3.63 German marks.

High Court of Appeals.[10] By the concept of "Handeltreiben," one understands each act as directed toward commercial self-interest and profit. It is not necessary that the accused be in possession of the goods, or even have had them in his possession, nor, as we shall see shortly, is it necessary to be dealing with the genuine substance. The concept covers the occasional or one-time transfer and even negotiations.

Perhaps an example will help to clarify the breadth of the concept. In 1950, a man offered for sale a substance which he believed was cocaine. While no sale ever took place, the man was picked up by the police for violation of the Opiumgesetz. As it turned out, the substance offered for sale was ordinary salt, for which, of course, no license is needed. The German High Court of Appeals decided that in order to come within the concept of "Handeltreiben" of paragraph I(1) of Section 10, it is not necessary that the substance offered actually be a substance covered by the law.[11] It is also not necessary that the goods be present and at the disposal of the perpetrator or in his possession. The mere negotiation of a contract with the intention of closing the contract is sufficient to come within the meaning of the term. The court reasoned that since the law does not require that the goods offered actually be at the disposal of the perpetrator. it does not matter whether the substance whose delivery promised is covered by the law, whether the perpetrator merely thinks it is, or whether he plans to deliver a substitute. In the case decided, the defendant wanted to sell real cocaine for profit, which he himself designated as cocaine. The court decided that such action came within the meaning of the term "Handeltreiben."

Several other problems raised by paragraph I(1) of Section 10 remain to be treated. In addition to "Handeltreiben," paragraph I(1) makes punishable the import, export, extraction, production, manufacture, acquisition, delivery, sale and otherwise bringing into commercial traffic of a covered substance without a license. We can now return to our basement producer of LSD, who produces only for his personal consumption. While we have seen that he need not obtain a license to manufacture LSD for himself, we see from paragraph I(1) that he is still subject to the penal provision. Paragraph I(1) contains no qualifying provision that the production or manufacture must be engaged in for purposes of trade or profit. To violate the provision of paragraph I(1), one need only produce the proscribed drugs without the license pro-

[10] Judgment of July 1, 1954, 6 BGHSt 246.
[11] *Id.*

vided for in Section 3. It is of no consequence that Section 3 does not require a license for such production.

The remaining concepts to be explained concern delivery (Abgabe), acquisition (Erwerd) and the bringing of narcotics into commercial traffic (Inverkehrbringen). These are legal terms which have a definite meaning under German law. The concept of delivery (Abgabe) seems at first to present no problems. It obviously encompasses both sales and gifts. But consider the following case. A woman, the wife of an unlicensed medical healer, gave one of her husband's patients injections of morphine. The woman was prosecuted for violation of the Opiumgesetz for the reason, among others, that the giving of morphine injections without a license was a "delivery" within the meaning of the prohibition of paragraph I(1) of Section 10. The German High Court of Appeals held that the dispensing of a drug or preparation covered by the law through direct application to the body of another, especially through shots, was not a "delivery" within the meaning of paragraph I(1).[12] According to the court, "delivery" is a legal term which is applicable only when goods are delivered to the custody of another, so that they can be transferred, consumed or disposed of at his discretion. The application to the body of another, especially through shots, does not fall within the legal meaning of this term. In such a case, it remains to be determined whether the acquisition of the substance in the first place was punishable.

Acquisition in the sense of the Opiumgesetz is similar to the concept of "Ansichbringen" of Section 259 of the Criminal Code[13] dealing with receiving of illegally obtained goods. Acquisition in this sense does not refer specifically to the physical acquisition of the goods, although that may be included in the meaning. Acquisition here refers to the power of disposal over the goods which the perpetrator must obtain. The person acquiring the goods must have the power to use the goods as his own or to dispose of the goods as his own. The mere taking into custody of the goods, for example, for safekeeping, probably does not come within the meaning of acquisition. However, accepting the goods as a gift comes within the meaning of the term as long as they can be used or dispensed with at the will of the receiver.

Two questions under Section 10 remain. First, what law is applicable in the case where one illegally comes into the possession of substances covered by the law in a manner not proscribed by the Opiumgesetz, as for example, by theft? In the provisions of the

[12] Judgment of April 5, 1951, 1 BGHSt 130.
[13] StGB § 259 (Beck 1970).

Opiumgesetz there is no specific mention of a penalty for obtaining narcotics by acts which in themselves are criminal offenses. Secondly, is there a provision in the Opiumgesetz which makes the mere possession of narcotics a violation?

The first question is easily solved. Section 10 provides that the penal provisions of the Opiumgesetz are applicable unless a more severe penalty is incurred according to another penal provision. Thus, where the narcotics are obtained through simple or aggravated theft, robbery, misappropriation, embezzlement, receiving, fraud, forgery, duress or extortion, the provisions of the Criminal Code are applicable since the penalties provided for in the Criminal Code are more severe. This is particularly important as it concerns the acceptance of substances covered by the law, as for example by gift, which have been obtained by illegal means. In such case, Section 259 of the Criminal Code concerning receiving of illegally obtained goods is applicable, rather than the Opiumgesetz.

The question whether mere possession is an offense under German law is of some practical import, especially as concerns the U. S. Forces obligation under Article 19 of the Supplementary Agreement to the NATO Status of Forces Agreement[14] to inform the German authorities of offenses against German law committed by United States personnel. A close scrutiny of the Opiumgesetz will not reveal any provision which specifically covers mere possession.[15] Consequently, one often hears that mere possession of narcotics is not an offense under German law. However, there does not appear to be general agreement among German lawyers and prosecutors as to how to interpret the Opiumgesetz on this point. Some prosecutors, by use of a legal fiction, are attempting to include mere possession within the prohibitions of the law. It is obvious, they reason, that if a person is found to be in possession of a substance covered by the law, he must have obtained it in some manner. Consequently, they reason, although mere possession is strictly speaking, not a violation of the law, there is a very strong supposition that the narcotics have been obtained through illegal means. Thus, mere possession is in effect equated to coming

[14] TIAS 5351 (1963).

[15] The last portion of paragraph I(1) of Section 10 provides that whoever obtains, produces, manufactures, keeps or delivers the covered substances at places not permitted for such purposes is also subject to punishment. The word "keep" (aufbewahren) could be interpreted as a specific basis for including mere possession as a violation of the law; however, this term refers to keeping in the sense of storing or preserving, rather than to mere possession. The provision was intended to apply to categories of persons such as pharmacists, and not to individuals merely in possession of narcotics.

into possession by illegal means, unless the contrary is shown. It remains, of course, for the violation to be proven, but, practically speaking, the supposition is strong unless the possession can be otherwise explained. Thus, in accordance with this construction of the Opiumgesetz, notice under Article 19 of the SOFA, in cases which we characterize as mere possession, may be required if demanded by the prosecutor.[16]

The remaining subsections of Section 10 are of little interest in this discussion and I will only briefly mention the more important ones. Paragraph I(4) relates to Section 9, which I have already mentioned. Section 9, as we saw, constitutes an absolute prohibition of any sort of trading, trafficking with or preparation of opium, its residues used for smoking, and of the residues and resins obtained from hemp, especially hashish and marihuana. Violators are subject to the penal provisions of Section 10. Paragraphs I(5), I(6), I(8), and I(9) deal with complicated ordinances relating to the issuance of prescriptions by physicians and the duties of pharmacists. Paragraph I(7) subjects to punishment those who use the postal services to mail substances covered by the Opiumgesetz in violation of international postal conventions.

Paragraph II of Section 10 makes punishable the attempt to commit any of the offenses set out in Section 10. Let us return to the case of the man who offered for sale a bottle of ordinary kitchen salt, believing it to be cocaine. The court very easily found the accused guilty of an attempt even though the substance dealt with was not cocaine. The court reasoned that since the accused was of the belief that he was dealing with cocaine, he had attempted to deal with cocaine and therefore fell within the prohibition of paragraph II of Section 10. In such case, one may question why the court took such pains to find the offense of "Handeltreiben" under paragraph I of Section 10 when establishment of attempt was so easy. The difference, of course, is in punishment. The penalty for completed intentional offenses under the Opiumgesetz is imprisonment up to three years, plus a fine. The Opiumgesetz does not provide the penalty for attempt and to find it we have to look to Section 44 of the Criminal Code.[17] Section 44 provides that pleted one and that, as concerns the cases here, the penalty may be

[16] It should be noted in this connection that it is not necessary to have absolute proof of an offense under German law before notification under Article 19 is required. Thus, German authorities may request notification in cases characterized as mere possession since they may consider such cases as an attempted offense may be punished more leniently than a com- sufficient evidence of an offense to require notification.

[17] StGB § 44 (Beck 1970).

reduced to one-quarter of the minimum sentence for the completed offense.

Paragraph III of Section 10 provides the penalty for negligent commission of the acts prohibited by the other paragraphs of Section 10. By negligence, within the meaning of this provision, is generally meant error with regard to the applicability of a legal provision, the necessity to obtain a license or permit, or the obligation to keep books. The penalty for the violation of this Section is imprisonment up to one year or a fine.

Paragraph IV of Section 10 is an interesting provision, for discussion of which I will once again return to the case of the would-be cocaine salt-seller. Paragraph IV provides that if substances brought into commercial traffic (Inverkehrbringen) are held out to be substances covered by the law, the penal provisions of Section 10 will apply even if such substances are not genuine. Thus, one who has sold oregano as marihuana may be prosecuted under this Section. This would seem to fit perfectly the case of the man who attempted to sell ordinary salt as cocaine. However, merely *offering* the salt for sale, it was not brought into commercial traffic, that is, such act did not fall within the meaning of "Inverkehrbringen." The court determined that to meet the requirement of this paragraph something more than a mere offer was needed.[18] However, as we have seen, such conduct does fall within the meaning of "Handeltreiben" contained in paragraph I.

III. DEFENSES AND MITIGATION

A. *DECREASED RESPONSIBILITY*

Section 51 of the Criminal Code[19] provides for the reduction or exclusion of legal responsibility where, because of a mental disturbance or a biological condition, the perpetrator is incapable of understanding the wrongfulness of his act or to act according to this understanding. Since the narcotic addict is today generally regarded as a sick person, Article 51 may be considered, in appropriate cases, to be applicable to the addict who commits such offenses. Article 51 may also be applicable where no addiction is involved but where the perpetrator is acting under the influence of narcotics or drugs. The determination of when Article 51 is applicable is complicated and is in itself worthy of extensive treatment. Suffice it here to say that there are several situations where Arti-

[18] Judgment of July 1, 1954, 6 BGHST 246.
[19] StGB § 51 (Beck 1970).

cle 51 may be applicable: (1) offenses committed to obtain a narcotic or money to buy a narcotic under compulsion for the narcotic; (2) offenses committed while under the influence of a narcotic; and (3) offenses involving the taking of narcotics before commission of the offense in order to overcome inhibitions.[20]

In addition to the provision of Article 51, the Criminal Code, in Sections 42(b) and 42(c),[21] provides for the commitment to an institution for care and treatment of persons who have committed serious offenses while in a condition which would permit the application of Article 51. In cases where only the decrease of responsibility is warranted, commitment to an institution will not preclude imposition of punishment.

B. *SEARCH AND SEIZURE*

Because of the nature of offenses under the Opiumgesetz, the provisions concerning search and seizure are very important. They are found in Article 13 of the Basic Law[22] and Sections 94 to 111 of the Code of Criminal Procedure.[23] Article 13 of the Basic Law, the German Constitution, provides that the home shall be inviolable and that searchers may be ordered only by a judge, or, in the event of danger in delay, by other officials as provided by law. Searches may be carried out only in the form prescribed by law. Article 102 of the Code of Criminal Procedure provides that when a person is suspected as a perpetrator of, or participant in, a punishable act, or as an accessory or receiver, a search of his person or abode may be made either for the purpose of apprehending him or if it is presumed that such search will lead to the discovery of evidence. The law does not require that there be a "strong" suspicion or even a "reasonable" suspicion. Experience has demonstrated, however, that the judge or official issuing the search warrant will apply a standard of reasonableness. Nevertheless, the power of the German police to make searches to seize

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[20] While Section 51 may remove or reduce legal responsibility for a certain offense committed under compulsion for or under the influence of drugs or narcotics, the perpetrator may still be punished in accordance with Section 330(a) for knowingly and wilfully putting himself in a condition for which he cannot be held responsible for his acts. Section 315(a) of the Criminal Code, which punishes with imprisonment those who operate motor vehicles while under the influence of intoxicants, including narcotics and drugs, should also be noted.

[21] StGB § 42 (Beck 1970).

[22] Grundgesetz art. 13 (1949, amended 1961, 1968) (Ger).

[23] StPO §§ 94–111 (Beck 1970).

objects is more extensive than that of their American counterparts.

Other persons or their dwellings may also be searched, but only for the purpose of apprehending the accused or obtaining evidence. In these cases, "facts" must exist from which it can be concluded that the accused or evidence of the offense is present. An interesting provision concerns searches during the nighttime. During specified nightttime hours, searches may be made only in cases of pursuit subsequent to an offense or in case of danger in delay. This limitation does not apply to public places, to places under police supervision or to places known to the police to be gathering or hiding places for known offenders.

Searches may be ordered only by a judge, or, in case of danger in delay, by certain officials of the prosecutor's office. The occupant of any room to be searched, or his representative, is entitled to be present during the search. If during the search, objects are found which are unrelated to the investigation, but indicate the commission of another offense, they may be temporarily seized and the prosecutor's office notified thereof. If the judge or prosecution is not present at the search, a municipal official not a member of the police, must be present at the search.

A frequently recurring problem, inherent in the presence of two sovereigns on the same territory, arises when areas not under the control of the United States Forces are searched, as, for example, the off-post apartment of an American soldier. As has already been mentioned, the authority of German police to make a search is broader than that permitted by American law. Consequently, if evidence is discovered through a search made by German officials which would not be regarded as "reasonable" or made upon probable cause under American law, such evidence may be excluded in an American court-martial if it can be shown that the search was made at the insistence or encouragement of United States authorities.[24] Of course, in almost any joint search, it would not be difficult for defense counsel to argue such a state of facts. On the other hand, if it is shown that the evidence is turned up by German authorities through an investigation and search made on their own initiative, such evidence may be turned over to the

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[24] The MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para. 152, provides: "Evidence is inadmissible against the accused if it was obtained as a result of an unlawful search of the person or property of the accused, conducted, instigated, or participated in by an official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a Government capacity. . . ."

United States authorities and successfully used in a court-martial.[25]

Where United States authorities institute investigations leading to areas not under U. S. jurisdiction, it is customary to call in German authorities to assist in making a search. In such a case, German authorities will probably insist on making an extensive search in accordance with their law. Such action will in many cases lead to undesirable rulings on admission of evidence in American courts-martial. Strictly speaking, there is no legal solution to this problem. German authorities are well within their rights in making such searches. However, since in most cases involving United States Forces personnel, German authorities do not choose to exercise jurisdiction, it may be possible to convince them to refrain from making an extensive search so that American procedures can be complied with in order to preserve the evidence for a court-martial. The alternatives for German authorities, neither of which they may desire, are to assume jurisdiction or to allow the offender to go unpunished. Faced with such a dilemma, German authorities may be willing to proceed in a manner that will preserve the evidence for use in a court-martial.

C. *THE YOUTH COURT LAW*

The use of narcotics, drugs and marihuana by young people, both members of the United States Forces and dependents of members of the United States Forces and the civilian component, has become a problem of increasing concern in Germany.[26] In most cases involving members of the United States Forces, German authorities have not recalled the waiver of jurisdiction. But as concerns dependents, German authorities have exclusive jurisdiction. Because of the nature of the offense, the language difficulties, and the young persons involved, the United States Forces and others concerned typically prefer that these cases, like the great percentage of cases involving members of the Force, be disposed of internally. Most German authorities would also prefer to leave these cases in the hands of the United States authorities. However, since there is exclusive German jurisdiction over these cases, German authorities must follow criminal procedural law.

[25] United States v. De Leo, 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954).

[26] In part, this is a reflection of the increasing rate of use of narcotics, drugs and marihuana by young people throughout Germany. In 1966, only 5.2 per cent of reported narcotics violations in Germany involved adolescents from 18 to 21 years of age and only 3.2 per cent involved juveniles from 14 to 18 years of age. In 1968, 24.6 per cent of reported cases involved adolescents and 10.7 per cent involved juveniles. Rhein-Neckar Zeitung, p. 13, 14 Jan. 1970.

Section 163 of the Code of Criminal Procedure provides that the police are charged with the investigation of all punishable acts and are required to turn over without delay all assembled evidence to the prosecutor's office.[27] Once the prosecution has knowledge of a punishable act, there is a sufficient factual basis and if the offense is not minor the prosecutor's office must prefer the public charges. However, as concerns young offenders, a separate law is applicable—the Youth Court Law.[28] This law is divided into two parts, one applicable to juveniles between the ages of 14 and 18 (Jugendliche) and the other applicable to adolescents between 18 and 21 (Heranwachsende). Section 3 provides that a juvenile is responsible under the criminal law only if he was sufficiently mature morally and mentally to understand the wrongfulness of his act and to act according to this understanding. Section 105 provides that if it is determined that an adolescent between the ages of 18 and 21 was actually equal in his moral and mental development to a juvenile, he will be treated as such; otherwise he will be treated as an adult.

The Youth Court Law contains special provisions concerning procedures, punishments, rehabilitations and reform of the youthful offender. A full discussion of these provisions is not within the purview of this article, except insofar as the provisions relate to discontinuance of proceedings against a juvenile offender. I have already mentioned that in most cases it is in the interest of the United States Forces and those concerned to maintain control over cases involving dependents of members of the Force and the civilian component. We have also seen that in accordance with the Code of Criminal Procedure the prosecutor must prefer the public charges if the evidence so warrants. However, as concerns juvenile offenders and adolescents who are to be treated as juveniles, Sections 45 and 47 of the Youth Court Law may provide a way out of this dilemma. Section 45 provides that if the prosecutor deems a court sentence unnecessary, he may suggest to the youth court judge that the accused (if he has confessed) be ordered to do a specific work, be given special duties or be given a reprimand. Further, the prosecutor may desist from prosecuting without conrurrence of the judge if correctional measures already ordered have rendered a sentence unnecessary or if in accordance with Section 153 of the Code of Criminal Procedure[29] the offense is considered minor. Section 47 provides that the judge may discon-

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[27] StPO § 163 (Beck 1970).
[28] Jugendgerichtsgesetz, Law of 4 August 1953 (BGB1 I 751).
[29] StPO § 153 (Beck 1970).

tinue the main proceedings if he determines the conditions in Section 45 are present or if he determines that the accused is legally not responsible due to lack of maturity. It should be noted that there are no similar provisions applicable to adolescents who are not to be treated as juveniles.

The correctional measures contemplated by Section 45 can be measures taken by parents, teachers, ministers and government authorities, and include curfew, restriction, suspension of driving privileges and weekly reporting to a Youth Council Officer. While experience has shown that German prosecutors are reluctant to dismiss such cases on their own motion, if United States authorities demonstrate that sufficient correctional measures have been taken, the prosecutor may suggest to the judge that the prosecution be dropped in accordance with Section 45. There also exists the possibility in accordance with Section 153 of the Code of Criminal Procedure that the prosecution will be dropped if the offense is considered minor. This latter possibility also exists as regards adolescents.

IV. THE CURRENT STATE OF NARCOTICS REGULATION

A. *APPLICATION OF THE LAW*

The impression that one gains from an examination of German criminal statistics is that violations of the Opiumgesetz have not been dealt with stringently. Statistics compiled by the German Criminal Police[30] reveal that of the thirty-nine criminal prosecutions reported during the years 1966 and 1967, thirteen were discontinued, four resulted in fines up to DM800, six in imprisonment up to one year, one in imprisonment up to two years, two in imprisonment up to six months plus a fine up to DM750, one in acquittal, one in commitment to an institution and one in imposition of educational measures for a juvenile.[31] In 1968. 1,353 prosecutions were initiated, of which 899 were not terminated during 1968 and for which statistics are not available. Of the cases terminated in 1968, 216 resulted in convictions, 230 in discontinuances, seven in acquittals and one in commitment to an institution. Of the 188 final convictions, seventy-two resulted in fines between DM100 and DM1,000, ninety in imprisonment from two months to one year, eight in imprisonment up to two years, seven in impris-

[30] Bundeskriminalamt, POLIZEILICHE KRIMINALSTATISTIK 1968, VERBRECHEN UND VERGEHEN GEGEN STRAFRECHTLICHE NEBEN-UND LANDESGESETZE-OHNE VERKEHRSDELIKTE (1969).

[31] The remaining 10 cases were still pending at time of the report.

onment up to three months plus a fine up to DM1,500, four in imprisonment up to one year plus a fine up to DM230 and one in imprisonment up to three years plus a fine of DM1,000.

German authorities have recalled the waiver of jurisdiction over members of the U. S. Forces for violations of the Opiumgesetz in only a few cases. In one case, a rather serious one in which a large amount of marihuana was confiscated, two U. S. Forces members were prosecuted. One was sentenced to pay a fine of DM150, or fifteen days confinement, and the other to pay a fine of DM900, or forty-five days confinement. Prosecutions against dependents of members of the U. S. Forces have been initiated in several cases, of which three have come to trial. The first, involving importation of marihuana by juveniles, resulted in sentences to unsuspended confinement of three weeks, with credit for three weeks pretrial confinement. The second case, involving a dependent wife, resulted in an acquittal. The third, involving a juvenile, resulted in a reprimand warning and a DM100 fine.

B. *RECENT CRIMINAL CODE REFORMS*

The manner in which the law has been applied has changed considerably since 1 April 1970, the date on which major reforms in the German Criminal Code came into effect.[32] The reform is broad in scope, but as concerns this article, only the measures affecting punishment and probation are important. The reform provided for suspended sentences under certain conditions in place of confinement and has eased provisions for probation. It is contemplated that in place of confinement up to six months, fines or suspended sentences will be imposed. However, in cases where there are special circumstances and it is deemed necessary to impress on the convicted person the gravity of an offense or to protect the legal order, confinement may be adjudged. Further, if confinement up to a year is imposed, the court has an increased power to suspend execution of the sentence and impose probation if it is believed that the convicted person considers the conviction to be a warning and will no longer commit offenses. For a sentence of up to two years confinement, suspension of the sentence and probation is possible if there exist special circumstances. For repeat offenders, increased penalties are contemplated where circumstances warrant. The Criminal Code reform is aimed mainly at keeping minor offenders out of prisons and toward an increased resort to rehabilitative measures. As concerns first-time or minor

[32] Erstes Gesetz ur Reform des Strafrechts, Bundesgesetblatt, Teil I, Nr. 52, Seite 645 (1969).

violators of the Opiumgesetz, the result will probably be to dispose of such cases by fines or suspended sentences. Repeat offenders, who do not fall in the category of addicts, will probably incur harsher treatment.

C. *THE FEDERAL GOVERNMENT'S PROPOSED ACTION PROGRAM TO COMBAT DRUG ABUSE*

On 12 November 1970 the Federal Ministry for Youth, Family and Health announced an action program for combating the misuse of drugs and narcotic substances.[33] The program is a comprehensive one which commits the Federal Government to effectively take measures to counteract the abuse of drugs and narcotics. Included in these measures are proposed amendments to the Opiumgesetz, increased cooperation between federal, state and local agencies, increased public information programs, models and recommendations for prophylactic and therapeutic aid, increased research and increased international cooperation.

In the legislative fields, amendments will be introduced which will (a) insure improved coordination and cooperation between all (b) expand the operations of the Bundesopiumstelle, the Federal authorities concerned with combating the illegal traffic in drugs, Narcotics Office, and (c) revise the penal provisions of the Opiumgesetz. Concerning revisions to the Opiumgesetz, it will be proposed that the seriousness of violations be taken into consideration so that in especially severe cases (for example, violations committed by professional criminals or organizations) an increase in the minimum and maximum sentence up to ten years is possible. In addition, actions not presently subject to punishment, for instance, the possession of prohibited drugs and narcotics, will be made punishable.[34] It is also contemplated that all drugs and narcotics subject to the Opiumgesetz will continue to be treated uniformly, thereby giving no recognition to the argument that marihuana should not be treated in the same manner as other dangerous drugs and narcotics. It will also be proposed that the prescription of heroin for any purpose be prohibited, that certain psychotropic substances not already covered by the Opiumgesetz be brought under its control, that prescription of narcotics be done only on special forms, and that the theft of narcotics from pharmacies be hindered by increased safety measures.

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[33] Informationen des Bundesministeriums fuer Jugend, Familie, und Gesundheit, *Aktionsprogram der Bundesregierung Zur Bekaempfung des Drogen- und Rauschmittelmissbrauchs*, 12 November 1970.

[34] Compare with the discussion surrounding footnote 15.

ANNEX A

LAW CONCERNING THE TRADE WITH NARCOTICS

Dated 10 December 1929 (Law Gazette of the Reich I 215. Federal Law Gazette III 2121–6), last Law to amend the Law dated 24 May 1968 (Federal Law Gazette I 503, 516).

(Excerpt)

Section 1. (Definitions of Drugs and Preparations)

I. Drugs within the meaning of this law are:

1. (a) Raw opium, opium for medical purposes, coca leaves, raw cocaine,

(b) Morphine, diacetylmorphine (Heroin), and the other chemical compounds of morphine, Dihydrohydroxycdeinone (Dicodid), Dihydromorphinone-hydrochloride (Dilaudid), Dihydrohydroxycodeinone bitartrate (Eukodal), Dihydrodeoxymorphine-D (Paramorfan), Acetyldihydrohydroxycodeinone (Acetyldemethylodihydrothobain, Acedicon) and its chemical compounds, Morphine-Amioxyd (Morphine-noxyd, Genomorphine), the derivations of Morphine-Aminoxyds and the other derivations of with five times the value of nitrogen, Thebaine,

Benzylmorphine (peronin) and the other ether of Morphine, so far as not specified under 2, Cocaine, ecgonine and the other esters of ecgonine, Methylphenylperidincarbonic citetylalster (Delartin), Phenylpropanolamine (Aktedron, Benzedrin, Esaltenon), Methamphetamine Hydrochloride (Pervitin),

(c) the salts of the drugs specified under (b),

(d) Indian hemp;

(2) Codeine, ethylmorphine (Dionine) and their salts.

II. Drugs which according to scientific research have the same damaging effects as those mentioned under paragraph 1, No. 1 may be considered equal to those by decree of the government of the Reich issued with the approval of the Reichsrat.

IIa. Substances from which drugs mentioned under paragraph 1

or drugs equal to those on the basis of paragraph 2 can be produced, may be considered to be equal to those drugs specified under paragraph 1, by decree of the government of the Reich issued with the approval of the Reichsrat.

III. Preparations within the meaning of this law are:

1. All preparations which contain substances listed under paragraph 1, No. 1(a) to (c), preparations containing morphine, cocaine, or salts therefrom: however, only if the contents of the preparations with regard to morphine is more than 0.2 percent and with regard to cocaine, more than 1.1 percent.

2. Extracts of Indian hemp and Indian hemp tincture.

3. All preparations of drugs which, pursuant to paragraph 2, are considered equal to the drugs listed under paragraph 1, No. 1.

Section 3.

I. The import and export of the drugs and preparations, their extraction, production and manufacture for the purpose of putting them into trade for profit, the trade with them, their acquisition, delivery and sale, as well as any other similar trade, is permitted only to persons who obtain a license for this purpose. The Federal Health Office will decide on applications for the issuance of such license in agreement with the competent Land government. The places for which such license is given shall be designated therein.

II. The license may be restricted.

III. The license shall not be given if a need for its issuance does not exist or if there is concern for the protection of health or personal reasons exist which do not allow such issuance. The license obtained may be cancelled for the same reasons.

IV. Pharmacies do not need a license, pursuant to paragraph 1, for the acquisition of drugs and preparations or their manufacture, as well as for their delivery based on prescriptions of physicians, dentists or veterinarians. Further, a license is not required for the manufacture and delivery of drugs destined for officially approved medical first-aid kits, for the acquisition, manufacture and delivery of drugs and preparations destined for officially approved medical kits of veterinarians. A license is not required for persons who acquire drugs and preparations from pharmacies on the basis of a prescription of a physician, dentist or veterinarian or from officially approved medical kits of physicians and veterinarians who obtained a license for the delivery of such drugs pursuant to paragraph 1.

Section 4.

I. The acquisition, as well as the sale and delivery of drugs and preparations, is permitted only on the basis of a permit bearing the name of the person acquiring such material, issued for each individual case of acquisition, sale and delivery.

Section 5. (Obligation to Keep a Stock-Book)

I. A person who obtains a license pursuant to Section 3 is obligated to maintain a stock-book in which he must record incoming and outgoing material as well as for the manufacture of the drugs and preparations, according to date and quantity. The entries concerning incoming and outgoing material must also indicate name and residence of the supplier and the recipient. A person who has a license to produce morphine and cocaine or to manufacture raw opium or coca leaves is further obligated to enter the contents of the acquired raw opium and coca leaves in the stock-book. The Federal Health Office may determine how the contents shall be found.

Section 9. (Prohibition of the Trade with Certain Drugs)

I. The import, transit, export and production of prepared opium, of the so-called "dross" and all other residues of the opium used for smoking, of the resin obtained from Indian hemp and regular preparations of this resin, especially hashish, as well as the trade with such drugs and preparations is prohibited.

Section 10. (Penal Provisions)

I. There shall be punished by imprisonment up to three years and by a fine or by one of these penalties, unless a more severe penalty is imposed according to other penal provisions:

1. Whoever, without a license specified under Section 3, imports, exports, extracts, produces, manufactures, trades, acquires, sells or otherwise brings into commercial traffic drugs and preparations or obtains, produces, manufactures, stores, sells or delivers them at places not permitted for such purposes;

2. Whoever acquires, delivers or sells the drugs and preparations without a permit provided for under Section 4;

3. Whoever in order to obtain such permit makes false statements of facts in a request or makes use of a request containing false statements of facts to deceive the opium agency;

4. Whoever acts contrary to the prohibitions of Section 9;

5. Whoever acts contrary to the provisions issued on the basis of Section 5, pararaph 2, Section 6, paragraph 1 or 3 or Section 12;

6. Whoever acts contrary to the provisions issued on the basis of Section 4, paragraph 2 or paragraph 4, Section 7 or 8;

7. Whoever acts contrary to the provisions of the agreements of the world postal association, mails drugs or preparations;

8. Whoever fails to keep a stock-book for which he is responsible or makes incorrect or incomplete entries or fails to comply with his duty to give information or grant inspection of the business records and books;

9. Whoever acts contrary to the instructions of the Federal Health Office issued pursuant to Section 2, paragraph 3a.

II. In the cases of paragraph 1, No. 1 to 7, the attempt is punishable.

III. Whoever commits the act (paragraph I) by negligence shall be punished in the case of No. 1 to 5, 7 to 9, by imprisonment up to one year or by a fine; in the case of No. 6 by a fine up to DM500 or by detention.

IV. The provisions of paragraph 1 to 3 also apply if substances purported to be drugs or preparations designated under Section 1 are brought into commercial traffic without actually being such drugs or preparations.

V. Drugs and preparations used in the offense may be confiscated.

RECENT DEVELOPMENTS

Conscientious Objection and the Military: *Gillette v. United States, Negre v. Larsen*, ___ U.S. ___ (8 March 1971); *Ehlert v. United States*, ___ U.S. ___ (21 April 1971)*

In three cases decided this spring the Supreme Court faced the difficult task of balancing the needs of the military against the demands of the individual conscience. Two cases involved the peculiarly Vietnam War substantive question of "selective" or "single war" conscientious objection.[1] The third case involved the procedural consequences of a conscientious objector application based on views formed after receipt of a notice to report for induction.[2] Because of the objections to the Vietnam War and the Selective Service System each issue was emotionally charged beyond its rather narrow legal scope. In each case the Court rejected the conscientious objectors' arguments.

I.

Gillette v. United States and *Negre v. Larsen* raised the issue of the selective CO. Gillette was prosecuted for refusing induction. In his defense he contended that he should have been classified as a conscientious objector. He stated he would take part in a war of national defense or a United Nations peace-keeping mission but not in the Vietnam conflict. In framing the issue the Court found no reason to challenge Gillette's sincerity or the religious nature of his beliefs.

Negre raised his challenge by petition for habeas corpus after he had been inducted into the Army. He contended that only after the completion of infantry training and the receipt of orders to Vietnam did he see the unjustness of the Vietnam War. He maintained that the duty of a devout Catholic was to select between "just" and "unjust" wars. Negre's claims for conscientious objector status were denied within the military and in the lower federal

*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] Gillette v. United States and Negre v. Larsen, 39 U.S.L.W. 4305 (8 Mar. 1971).

[2] Ehlert v. United States, 39 U.S.L.W. 4453 (21 Apr. 1971).

courts. As in *Gillette*, the Court assumed Negre's sincerity and religious orientation.

The Court's decision turned on both the statutory interpretation and constitutionality of the conscientious objector statute.[3] The pertinent wording of the statute grants exemption to those "opposed to participation in war in any form." The Court rejected petitioner's claims that the statutory language covered their objection. "This language, on a straightforward reading, can bear but one meaning; that [objection] must amount to conscientious opposition to participating personally in any war and all war."[4] The Court based its statutory decision on the legislative history opposing petitioners' position and the "countervailing considerations, which are also the concern of Congress,"[5] namely, the difficulty of administering a Selective Service System which recognized the selective objector. Having decided the statutory issue, the Court emphasized that it had not made a judgment as to the nature of petitioners' religious beliefs or decided that objection to a single war equals an "essentially political, sociological or philosophical" view or a "personal moral code."[6]

Petitioner cited three constitutional objections to section 456(j): (1) the statute interfered with the free exercise of religion, (2) it impermissibly established religion by discriminating among types of beliefs, and (3) the asserted religious preference violated petitioners' rights to equal protection of the laws. All three arguments were rejected. The Court noted the central purpose of the establishment clause was to insure "government neutrality in matters of religion."[7] When "government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary impact."[8] The Court observed that 456(j)'s influence on religious affiliation or belief pertained only to attitudes toward war. Further, the need for fair administrative decisionmaking provided the "valid neutral reasons" for limiting its coverage to all war. The Court contended that recognition of the selective objector "would involve a real danger of erratic or even discriminatory decisionmaking."[9] Factors noted were the possible intrusion of political objectors, the great variety of al-

[3] 50 U.S.C. APP. § 456(j).
[4] Gillette v. United States and Negre v. Larsen, 39 U.S.L.W. 4305, 4307 (8 Mar. 1971).
[5] *Id* at 4308.
[6] *Id.*
[7] *Id.* at 4309.
[8] *Id.*
[9] *Id.* at 4311.

tered circumstances that might affect a claim and the possible endorsement of a general theory of selective disobedience of the law. In words rich with unintended irony, the Court concluded "Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service. . . ."[10] The Court did concede that Congress could corrode the public spirit by specifically exempting one-war objectors.[11]

II.

Petitioner Ehlert had received an Order to Report for Induction from his Selective Service local board. Shortly thereafter, and before he reported to the induction station, Ehlert informed his local board that he had become a conscientious objector. He stated that his CO views had crystallized only after the receipt of the induction notice. The board declined to reopen Ehlert's I–A classification and Ehlert was eventually prosecuted for failure to submit to induction.

The local board's decision turned on its interpretation of the Selective Service regulation governing the reopening of classifications after receipt of an induction notice. In pertinent part, the regulation provides ". . . the classification . . . shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[12] The board regarded Ehlert's change of beliefs as not a circumstance beyond his control. A California Federal District Court and a sharply divided en banc panel of the Ninth Circuit Court of Appeals affirmed the local board's decision.[13] By six to three vote the Supreme Court likewise affirmed.

The majority early stated its operating premise: "A regulation explicity providing that no conscientious objector claim could be considered by a local board unless filed before the mailing of an induction notice would, we think, be perfectly valid, provided that no inductee could be ordered to combatant training or service before a prompt, fair, and proper in-service determination of his claim."[14] Thus given protection from undesired *combatant* train-

[10] *Id.* at 4312.

[11] An amendment to the current Selective Service statutory scheme calling for exemption for "single war" objectors was rejected by the Senate 50 to 12. Washington Post, 9 Jun. 1971, at 1, col. 7.

[12] 32 C.F.R. § 1625.2 (1971).

[13] Ehlert v. United States, 422 F.2d 332 (9th Cir. 1970)

[14] Ehlert v. United States, 39 U.S.L.W. 4453, 4454 (21 Apr. 1971).

ing an inductee cannot complain of reasonable timeliness rules promulgated by the Selective Service System. The Court emphasized that such late crystallizers must be given "a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria that must guide the Selective Service System."[15] While noting that the late assertion of a CO claim "might cast doubt upon the genuineness" of it, the Court speculated that such claims "could" be valid.[16]

Having found a satisfactory statutory interpretation the majority held it "need not take sides" in the debate over whether a change in conscience was a circumstance beyond control of the individual. "Given the ambiguity of the language, it is wholly rational to confine it to those 'objectively identifiable' and 'extraneous' circumstances that are most likely to prove manageable without putting undue burdens on the administration of the Selective Service System."[17] Finally, the Court expressed its satisfaction that the military was providing the "full and fair opportunity" for late crystallizing objectors prior to their undergoing combatant training.[18]

In dissent, Justice Douglas argued that "we have a choice in construction which really involves a choice of policy."[19] Citing instances of military hostility toward conscientious objectors the Justice urged that such decisions be left to civilian authorities.[20]

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[15] *Id.* at 4455.

[16] *Id.*

[17] *Id.*

[18] The Court did note a certain confusion in Army regulations regarding the obligation to entertain the late crystallizer's claim. Army Reg. No. 635–20, para. 3*a* (31 July 1970), provides consideration will be given to CO discharge requests "when such objection develops *subsequent to entry* into the military service." Subparagraph *b*(1) holds that claims "will not be favorably considered when—(1) Based on conscientious objection which existed, but which was not claimed *prior to notice of induction*. . . ." The Court, however, relied on a letter in the briefs from the General Counsel of the Army to assure themselves that *Ehlert* crystallizers were given an opportunity to present their claim. *Id.* at 4456.

[19] *Id.* at 4456.

[20] "[I]n my time every conscientious objector was 'fair game' to most top sergeants who considered that he had a 'yellow streak' and therefore was a coward or was un-American. The conscientious objector never had an easy time asserting First Amendment rights in the Armed Services. . . But the military mind is educated to other values; it does not reflect the humanistic, philosophical values most germane to ferreting out First Amendment claims that are genuine." *Id.* at 4457. Justice Douglas' views are reminiscent of his attitudes toward the military criminal justice system expressed in O'Callahan v. Parker, 395 U.S. 258 (1969).

Significantly, in conclusion, Justice Douglas argued that conscientious objection may have constitutional dimensions. "Induction itself may violate the privileges of conscience engrained in the First Amendment."[21]

In a separate dissent Justices Brennan and Marshall rejected the notion that the pertinent Selective Service regulation was governed by a "reasonable, consistently applied administrative interpretation."[22] The dissenters found no interpretation of "circumstances over which the registrant had no control" from the National Selective Service Headquarters. Rather the government interpretation was merely one "taken for the purpose of litigation."[23] Furthermore, the dissenters refused to find ambiguity in the questioned regulation. "Circumstances" meant any conditions relevant to eligibility for a deferment. And by its very nature, conscientious objection was a matter outside the control of the registrant.[24]

III.

Negre and *Gillette* changed the Supreme Court's focus in recent conscientious objector cases from defining "religious training and belief" to defining "participation in war in any form."[25] Considering the "participation in war in any form" requirement 16 years earlier in *Sicurella v. United States*[26] the Court read in a requirement that participation be interpreted realistically. Accordingly, a Jehovah's Witness who talked of being in the Army of Christ and stated a willingness to fight in defense of his religion could qualify as a conscientious objector. In the interim between *Sicurella* and *Negre-Gillette*, the Court construed "religious training and belief" virtually beyond recognition while avoiding first amendment constitutional interpretations. In *United States v. Seeger*[27] the Court allowed conscientious objection based on a "sincere and meaningful belief which occupies . . . a place parallel to that filled by the God of those admittedly qualifying for the exemption."[28] Five

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[21] Ehlert v. United States, 39 U.S.L.W. 4453, 4458 (21 Apr. 1971). For discussion on the possible constitutional basis of conscientious objection, *see* Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968), and Brahms, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-a-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1 (1970).

[22] Ehlert v. United States, 39 U.S.L.W. 4453, 4460 (21 Apr. 1971).

[23] *Id.*

[24] *Id.*

[25] 50 U.S.C. App. § 456(j).

[26] 348 U.S. 385 (1955).

[27] 380 U.S. 163 (1965).

[28] *Id.* at 176.

years later in *Welsh v. United States*[29] the Court swept away any requirement that a claim be phrased in religious terms. Exemption was granted "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[30] Earlier in the opinion the Court had held that conscientious objector status might be granted one who held strong beliefs on political matters or "even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."[31]

Having liberally construed the religious requirements in favor of conscientious objectors, the Court returned to the "participation in war in any form" requirement last faced in *Sicurella.* After disposing of the first selective objection case, *United States v. Sisson,* on procedural grounds,[32] the issue was set to rest in *Gillette* and *Negre.*

IV.

The *Ehlert* opinion resolved a sharp division between the federal circuits.[33] The leading case allowing a local board to consider a conscientious objector claim filed after receipt of a notice of induction was the Second Circuit opinion in *United States v. Gearey.*[34] There the board distinguished the late crystallizing claim from the late filed claim. CFR 1625.2 validly authorized the rejection of a CO claim arising prior to notice of induction but not claimed until after receipt of the notice.[35] However, the same rule would not apply to the individual whose beliefs matured only after

[29] 398 U.S. 333 (1970).

[30] *Id.* at 344.

[31] *Id.* at 342.

[32] *See* United States v. Sisson, 399 U.S. 267 (1970). The district court in Sisson held that defendant could not be convicted for refusing induction because of his selective objector beliefs. The government accepted the district court's description of its decision as an arrest of judgment and sought appeal under 18 U.S.C. 3731 (1964). The Supreme Court found the application was not proper and that it lacked jurisdiction over the case.

[33] The Fourth Circuit, United States v. Al-Majied Muhammad, 364 F.2d 223 (1966); the Fifth Circuit, Davis v. United States, 374 F.2d 1 (1967); and the Sixth Circuit, United States v. Taylor, 351 F.2d 228 (1965), support the Ninth Circuit position. Opposing this position were the Second Circuit, United States v. Gearey, 368 F.2d 144 (1966); the Third Circuit, Scott v. Commanding Officer, 431 F.2d 1132 (1970); the Seventh Circuit, United States v. Nordlof, ___ F.2d ___ (1971); the Tenth Circuit, Keene v. United States, 266 F.2d 378 (1959); and the District of Columbia Circuit, Swift v. Director of Selective Service, ___ F.2d ___ (1971).

[34] 368 F.2d 144 (1966).

[35] *Id.* at 149.

receipt of the induction notice. The court noted the significance of the induction notice in crystallizing "once vague sentiments" regarding participation in the war.[36] The court further observed that the then-current Department of Defense Directive on conscientious objection rejected claims based on beliefs crystallizing at any time prior to actual induction.[37] As defined in *Gearey*, the local Selective Service board's responsibility was (1) to determine if the CO beliefs had ripened after notice of induction and (2) whether the beliefs qualified registrant for the conscientious objector classification. If both facts were found, the registrant "would be entitled to be reclassified."[38]

An understanding of the complex Selective Service regulations is essential to an understanding of the real significance of the late crystallization question. Without impugning the sincerity of his beliefs, the late crystallizer has by definition not consistently asserted conscientious objector beliefs to his local board. In many cases his CO application has been filed only after his local board has rejected deferments or other exemptions and that board's action has been upheld on appeal.[39] For the sincere objector, the induction notice may finally crystallize feelings toward participation in war. For the individual whose objections to military service are based on other than conscience, the notice may spur additional efforts to avoid military service. To both types of registrant the application for classification as a conscientious objector offers the possibility of significant delay of an induction date usually but a month in the future.

Prior to receipt of the induction notice a registrant must have been classified I–A (presently available for service).[40] Selective Service regulations provide that a local board may reopen that classification on the request of the registrant "if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification."[41] As noted earlier, to reopen a classification after receipt of an induction notice, a change in circumstances beyond the control of the registrant must be shown. The recent Supreme Court decision in *Mulloy v. United States* significantly limited a board's discretion in reopen-

[36] *Id.* at 150.
[37] Dep't of Defense Directive 1300.6 (21 August 1962).
[38] United States v. Gearey, 368 F.2d 144, 150 (2d Cir. 1966).
[39] *E.g.* Scott v. Commanding Officer, 431 F.2d 1132 (3rd Cir. 1970); Paszel v. Laird, 426 F.2d 1169 (2nd Cir. 1970); United States v. Gearey, 368 F.2d 144 (2nd Cir. 1966).
[40] 32 C.F.R. § 1622.10. (1971).
[41] *Id.* at 1625.2

ing classifications prior to notice where new facts established a prima facie case for a new classification.[42] The regulations further provide that upon reopening the board shall "again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of the new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."[43] The second immediate consequence of a reopening is the cancellation of any Order to Report for Induction unless the registrant has failed to comply with an Order to Report.[44] Assuming the local board would deny a conscientious objector classification the registrant is given 30 days to request a personal appearance before the board.[45] Assuming that appearance is of no avail, he is given an additional 30 days to appeal to the state Selective Service Appeal Board.[46] There his claim is re-examined *de novo*. Should his claim be denied by a divided vote, a further right of appeal to the Presidential Appeal Board exists.[47] At its most expeditious the Selective Service System probably could not process a rejection of a reopened conscientious objector claim in less than four months. Given board back-logs, necessary mailing times, and bureaucratic delay, the time from initial reopening, through the denial of the CO claim, to the issuance of a new induction order could be a year or more. Given the state of the Vietnam War, the proposals for abolition or limitation of military conscription and the availability of other deferments or exemptions, this delay may be of critical importance for the registrant even though his conscientious objector application is eventually denied.

If, on the other hand, a local board need not reopen a registrant's classification, no delay occurs. The board simply notifies

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[42] 398 U.S. 410. (1970). Mulloy had submitted a pre-induction notice request for classification as a conscientious objector. His local board had determined the information did not warrant a reopening of his 1–A classification. The Supreme Court ruled that 1625.2's permissive language did not authorize an arbitrary refusal to reopen in the face of "new facts which establish a prima facie case for a new classificaton." The Court found such facts had been presented, their truth was not "conclusively refuted by other reliable information in registrant's file," and there was little or no evidence that the board's action was based on demeanor at registrant's personal interview before the board. In practice Mulloy would seem to require a board to reopen a 1–A classification at any time prior to the mailing of an induction notice for a first time CO claimant who has stated his claim in the language of the statute.

[43] 32 C.F.R., 1625.11 (1971).

[44] *Id.* at 1625.14.

[45] *Id* at 1624.1.

[46] *Id.* at 1626.2.

[47] *Id.* at 1627.3.

the registrant that his classification will not be reopened; no appellate rights arise; and no delay in induction need take place.

To heighten the significance of this distinction court decisions have made clear what Judge Friendly has referred to as the "ease with which a *prima facie* case [for conscientious objection] can be articulated."[48] Increasingly, local boards have been required to state their reasons for denying conscientious objector claims where *prima facie* cases have been made.[49] Over the years courts have found that numerous factors in a registrant's application or his personal background will not *by themselves* be grounds for denial of conscientious objector status. Among such factors are a belief in self-defense,[50] a willingness to engage in theocratic war,[51] prior minor criminal derelictions,[52] objection to particular political policies,[53] the lateness of filing for CO status,[54] and the seeking of other Selective Service deferments.[55] While the board may consider such facts in assessing the critical sincerity issue[56] it would be the unusual case in which it could deny a claim without reopening the classification. The local board could probably deny reopening on a clear showing that (1) the registrant's application did not state a claim based on "religious training and belief" as interpreted by *Welsh*)[57] (2) the claim itself showed a lack of sincerity; or (3) other information in registrant's selective service file rebutted his sincerity. The registrant, with only limited guidance from an experienced draft counselor, should have little difficulty in

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[48] Paszel v. Laird, 426 F.2d 1169, 1174 (2d Cir. 1970).

[49] *Id;* United States v. Broyles, 423 F.2d 1299 (4th Cir. 1970); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); *see* Mulloy v. United States, 398 U.S. 410 (1970).

[50] *See, e.g.,* United States v. Davila, 429 F.2d 481 (5th Cir. 1970); United States v. James, 417 F.2d 826 (4th Cir 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); and Jessen v. United States, 212 F.2d 897 (10th Cir. 1954).

[51] Sicurella v. United States, 348 U.S. 385 (1955); United States v. Brown, 423 F.2d 751 (3d Cir. 1970); Kretchet v. United States, 284 F.2d 561 (9th Cir. 1960); Bouziden v. United States, 251 F.2d 728 (10th Cir. 1958); and United States v. Wilson, 215 F.2d 443 (7th Cir. 1954).

[52] Rempel v. United States, 220 F.2d 949 (10th Cir. 1955); and Chernekoff v. United States. 219 F.2d 721 (9th Cir. 1955).

[53] Welsh v United States, 398 U.S. 333, 339 (1970); United States v. Coffey, 429 F.2d 401 (9th Cir. 1970); United States v. Cummins, 425 F.2d 646 (8th Cir. 1970); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969).

[54] United States ex rel. Hames v. McNulty, 432 F.2d 1182 (7th Cir. 1970); United States v. Capobianco, 424 F.2d 1304 (2d Cir. 1970); and United States v. Broyles, 423 F.2d 1299 (4th Cir. 1970).

[55] United States v. Cummins, 425 F.2d 646 (8th Cir. 1970).

[56] Witmer v. United States, 348 U.S. 375 (1955).

[57] Welsh v. United States, 398 U.S. 333 (1970).

drafting his application to avoid the first two pitfalls. Further the Selective Service System at that stage of the proceedings would rarely have collected outside information tending to reject the sincerity of a CO claim.[58]

In deciding *Ehlert* the Court eliminated the possibilities of delay for the registrant claiming conscientious objection *after* receipt of his induction notice. While he still has the opportunity to present his claim, he must do it after his induction.

V.

The decisions in *Negre* and *Gillette* correspond with present military practice. Department of Defense and Army policies have required objection to all wars as a prerequisite for the granting of an in-service conscientious objector discharge.[59] Clearly, the soldier whose claim is based solely on his objection to participation in the Vietnam War cannot be granted discharge for his beliefs.

Gillette-Negre, however, must not be over-extended. By definition an objection to all wars would include an objection to the Vietnam conflict. Given the immediacy of the war and the intensity of feeling that it generates, many in-service objectors may make reference to the war in their conscientious objector application or interview. Federal courts have emphasized that a political or sociological view on all wars or a particular war is not *in itself* a reason for denial of an otherwise proper conscientious objector application.[60] Therefore, military interviewing and reviewing officers should avoid viewing any mention of the Vietnam War as conclusive evidence of either selective objection or a lack of *Welsh* "moral, ethical, or religious beliefs." These considerations are highlighted by the fact that the substantial majority of conscientious objector applicants have known no war other than Vietnam. The experienced military officers reviewing conscientious objector applications and interviewing applicants must attune themselves to the more limited, historical perspective of a 19-year-old reluctant inductee who has no memory of Pearl Harbor, VJ Day, the

[58] The majority of information in a typical registrant's file will have been supplied by the registrant himself, usually in support of one or more deferment claims. It would be the unusual case where such documents spoke against the sincerity of the registrant's objection to war.

[59] Dep't of Defense Directive 1300.6, § IVB (10 May 1968); Dep't of Defense Directive 1300.6, § VA (Amendment 3, 29 June 1970); Army Reg. No. 635–20 (31 July 1970).

[60] Welsh v. United States, 398 U.S. 333 (1970); United States v. Coffey, 429 F.2d 401 (9th Cir. 1970); United States v. Cummins, 425 F.2d 646 (8th Cir. 1970); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); and United States v. Fleming, 344 F.2d 912 (10th Cir. 1965).

early Cold War, or Korea. Instead his entire adolescence has seen a badly divided nation involved in a militarily, politically and morally questionable war.

VI.

Ehlert appears to be of greater significance to the military. Like *Negre* and *Gillette* it supports present military practice. Also, like *Negre* and *Gillette* it should not be over-interpreted.

Ehlert's first significance is in apparently requiring military conscientious objector procedures for the registrant whose beliefs crystallized between notice of induction and actual induction. As the Supreme Court noted "That those whose views are late in crystallizing can be required to wait, however, does not mean they can be deprived of a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria that must guide the Selective Service System."[61] The Court later emphasized that its holding in the case was based on the existence of a military forum for the late crystallizer.

Such language requires re-evaluation of DOD Directive 1300.6 and the accompanying service regulations. Language in the Directive emphasizes the grant of conscientious objector status as a matter of grace. "[B]ona fide conscientious objection . . . will be recognized to the extent practicable and equitable."[62] The Directive further holds that no "vested right" exists for any person to be discharged from military service and that an administrative discharge "is discretionary . . . based on judgment of the facts and circumstances in the case."[63] Further, pending final action on the application, the purported conscientious objector "should be employed in duties which involve the minimum *practicable* conflict with his asserted beliefs. . . ."[64]

Prior to *Ehlert* it was unclear whether the Department of Defense might repeal 1300.6 and reject any in-service processing of conscientious objectors. It was also not known the extent to which "discretionary" and "practicable and equitable" considerations

[61] Ehlert v. United States, 39 U.S.L.W. 4453, 4455 (21 Apr. 1971). Footnote 7 of the Ehlert opinion states that it "cannot be open to question" that late crystallizers are entitled to a forum. Significantly, the court goes on to note that "a claimant who, after induction, declined to utilize available administrative procedures or who failed to observe reasonable and properly publicized time cutoffs might forfeit his claim."

[62] Dep't of Defense Directive 1330.6, § IV B (10 May 1968).

[63] *Id.* at § IV B 1.

[64] *Id.* at § IV B 3*d* (emphasis added).

might lead to the rejection of an otherwise valid in-service conscientious objector claim[65] At a minimum *Ehlert* has the practical effect of requring the services to process the serviceman whose claims crystallized between notice and induction. To an extent therefore, DOD Directive 1300.6 has been engrafted to the federal statute governing the processing of conscientious objector claims. Outright repeal of the directive is no longer, if it ever was, strictly a Department of Defense concern. Now repeal would force the Selective Service System to process the late crystallizing claim.

It is also doubtful whether the military could successfully deny a conscientious objector discharge to an *Ehlert* objector solely on the grounds that it was not "practicable" or "equitable" from the point of view of the military. Quite possibly the words may indicate only the need for compliance with reasonable filing and timeliness requirements. This the Court has authorized.[66] On the other hand a command directive that only a specified number of conscientious objector applications could be accepted for the good of the command or a decision that it is not "practicable" to excuse an applicant from basic weapons training would probably violate *Ehlert*. Entitlement to military consideration under the "same substantive criteria"[67] as guides the Selective Service System would seem to require that an *Ehlert* objector not have his application denied on these grounds.

At least with regard to the *Ehlert* claimant (crystallization before induction) the language of the Directive and accompanying service regulations should be changed to reflect a matter of statutory right rather than military discretion. Quite likely the change would little alter present policies. It would, however, conform the language of the Directive to the demands of the Court and avoid unnecessary legal confusion.

A more uncertain question concerns the Court's post-*Ehlert* attitude toward conscientious objector processing for persons whose beliefs crystallized only after induction. The original DOD Directive was designed with this claimant in mind.[68] Its current version properly notes that "claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be

[65] *See generally* Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 UCLA L. REV. 975 (1970), and Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1969).

[66] See discussion in footnote 61, *supra*.

[67] Ehlert v. United States, 39 U.S.L.W. 4453, 4455 (21 Apr. 1971).

[68] Dep't of Defense Directive 1300.6 (21 August 1962).

considered."[69] While the typical applicant is probably a first tour draftee or enlistee, applications have been received from West Point graduates and career officers.[70]

Lower federal courts have in recent years shown a willingness to involve themselves in reviewing in-service CO determinations.[71] However, they have based their rulings on the premise that while an agency (here the Defense Department) and not promulgate certain regulations, it must follow them if it does.[72] It remains unclear whether any relief must be given the conscientious objector whose beliefs crystallized only after entry into the military, and if so whether the services can provide standards differing from those employed by the Selective Service. On its facts, *Ehlert* applies to the registrant who first raised his claim within the Selective Service System and whose processing was clearly governed by 50 U.S.C. § 456(j). However, having indicated a willingness to protect the rights of an Ehlert, the Court might be reluctant to deny relief to a soldier whose beliefs crystallized in the first weeks of military training. Accordingly, the limited re-writing of the DOD Directive should apply to the in-service crystallizer as well as the pre-induction crystallizer.

VII.

Ehlert does not comment on the fact-finding procedures used by the military.[73] Apparently they accept the present DOD scheme as "a full and fair opportunity to present the merits." Certainly by contrast with Selective Service System procedures, the military fares quite well.[74]

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[69] Dep't of Defense Directive 1300.6, § IV B 2 (10 May 1968).

[70] *See* United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969), and the considerable press coverage of West Point graduate Lieutenant Louis Font's efforts to secure a discharge for reasons of conscience.

[71] *See, e.g.*, the cases cited by Hansen in *Judicial Review of In-Service Conscientious Objector Claims*, 17 UCLA L. REV. 975, 976 (1970).

[72] *See, e.g.*, United States *ex rel* Donham v. Resor, 436 F.2d 751 (2d Cir. 1971); United States *ex rel* Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969).

[73] Even the dissenters raise no objection to the procedural scheme for processing in-service objectors' claims. Justice Douglas questions the subjective prejudices of military fact-finders and the registrant's inability to process his claim near his home.

[74] In this regard *see* Hansen, footnote 71, *supra*; and Rabin, *A Strange Brand of Selectivity: Administrative Law Perspectives on the Processing of Registrants in the Selective Service System*, 17 UCLA L. REV. 1005 (1970). Hansen notes that the military procedure requires the reasons for denial of claims to appear in the record, a practice not uniformly followed by the Selective Service System. He also finds a "greater sensitivity to the interpretation" of the religious training and belief requirement in the Department of Defense Directive than in the Selective Service regulations. Hansen, footnote 71, *supra*, at 997.

Ehlert also supports, or at least does not impliedly reject, most of the military's objective rules of claims evaluation. In the wake of *Ehlert,* military personnel will face essentially three types of claimants, all filing after their entry onto active duty. The beliefs of the first will have crystallized prior to receipt of his induction notice. The DOD Directive specifically refuses to entertain this tardy claimant's application.[75] Nothing in the *Ehlert* opinion rejects this approach, the Court's recognition of reasonable timeliness requirements would support it. The difficult questions are ones of fact in determining the exact date of crystallization. To some extent the applicant will aways be caught on the horns of a dilemma. Recently formed beliefs may suggest a lack of depth or sincerity. On the other hand, emphasis on the registrant's early religious, moral or ethical upbringing and the holding of CO views long before any encounters with the military may suggest an unclaimed pre-notice crystallization. The DOD Directive's recognition that pre-notice experiences can be considered if the conscientious objection was not "fixed" at least provides guidance.[76]

The second class of conscientious objector will be the *Ehlert* objector whose beliefs crystallized after notice but before actual induction. His claim can be considered under the existing Directive and regulations. The Directive's mandate to consider claims not "fixed" until entry into the service should be amended to include those fixed after receipt of an induction notice.[77] The Directive's language is reflected in the Supreme Court's statement: "The very assertion of crystallization just before induction might cast doubt upon the genuineness of some claims, but there is no reason to suppose that such claims could not be every bit as bona fide and substantial as the claims of those whose conscientious objection ripens before notice or after induction."[78] The Court does not answer the difficult question of whether the timing of filing a complaint *in itself* can provide a basis in fact for rejecting the registrant's sincerity.

This unanswered question also affects the third category of objector, the soldier whose views crystallized only after entry into the military. *Ehlert's* approval of reasonable timeliness

[75] Dep't of Defense Directive 1300.6, § IV B 2 (10 May 1968).

[76] *Id.*

[77] A corresponding amendment in Army Reg. No. 635-20 would clarify the ambiguity discussed in footnote 18, *supra.*

[78] Ehlert v. United States, 39 U.S.L.W. 4453, 4455 (21 Apr. 1971).

regulations[70] would seem to uphold the Army's limitations on filing while in the process of transferring units.[80] This would cover the frequently encountered situation of the soldier seeking CO status after receiving Vietnam reporting orders. Less clear is whether denial of CO status can be based solely on an individual's rank, length of service, or prior military training. Would a change in the Directive barring applications from career officers or service academy or ROTC graduates be a permissible "timeliness regulation?" The case is certainly stronger for the military in several respects. However, the genuineness of belief need not be any stronger for a first week inductee than a twenty year sergeant. Quite often the latter might present the better-considered case for discharge as a conscientious objector.

VIII.

The direct effect of *Gillette, Negre* and *Ehlert* on military practice may be negligible. Single-war objectors will continue to be denied exemption. Late crystallizers will continue to be processed within the military.

The cases do offer guidance as to the Supreme Court's attitude toward conscientious objection. While all three decisions went against the registrant none suggests the possibility of strict limitations on conscientious objection in the future. *Gillette* and *Negre* turned on a reasonably obvious reading of the statute. While *Ehlert* was not so clear-cut a decision, the Court recognized the importance of conscientious objector beliefs and sought to assure their fair evaluation. As with its earlier decision in *Relford v. Commandant*,[81] the Court indicates a willingness to allow the armed services to make sensitive legal and administrative decisions.[82]

Unanswered by the Court are the more pressing military questions: (1) What is the legal effect of a wrongly denied CO petition

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[79] *Id.*

[80] Army Reg. No. 635-20, para. 6*c* (31 Jul. 1970).

[81] ____ U.S. ____ (1971).

[82] *See* generally the Court's restraint of federal intervention in state proceedings in Younger v. Harris, ____ U.S. ____ (1971). The Court of Military Appeals has intimated that Younger might curb federal court intervention in military matters. United States v. Goguen, ____ U.S.C.M.A. ____, ____ C.M.R. ____ (1971).

in a court-martial for disobedience of orders?[83] and (2) What is the permissible scope of federal court review of a military conscientious objector determination? Another term of Court must provide these answers.

DONALD N. ZILLMAN**

[83] *See*, United States v. Larson, ____ U.S.C.M.A. ____, ____ C.M.R. ____ (14 May 1971); United States v. Goguen, ____ U.S.C.M.A. ____, ____ C.M.R. ____ (30 Apr. 1971); United States v. Stewart, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971); United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

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BOOK REVIEWS

The Legal Limits on the Use of Chemical and Biological Weapons, A. V. Thomas and A. J. Thomas, Jr. SMU Press, 1970.

The Legal Limits on the Use of Chemical and Biological Weapons, by A. V. Thomas and A. J. Thomas, Jr., is a comprehensive review and analysis of the many attempts by international conferences and organizations to limit the use of chemical and biological weapons. The authors have presented the pros and cons on the legality of CB weapons in a very detailed manner. An important aspect of the presentation is the background of the national positions concerning the various attempts to limit the use of CB weapons, such as the Hague Gas Declaration, the Washington Disarmament Conference, and the Geneva Protocol. This background provides insight into the international philosophy on war during the past 72 years.

The authors discuss the different types of laws separately. The material appears well organized from a legalistic point of view; however, this approach degrades the merits of the book to the layman. The differences and relationships between custom, treaty and the general principles of law are not very clear to one who does not have a working knowledge of international law. Unless an issue is covered by a treaty, it is difficult for the layman to determine what is or is not legal.

The authors have provided detailed references and supplementary information in the Notes at the end of the book. In a few instances, discussion in the Notes was more interesting than the text. Unfortunately, there is no way of measuring the relative merit of the contrasting opinions of the authors or sources cited in the references. As an example, in Chapter 1 the authors provide definitions and background on the nature and use of CB weapons. In attempting to support their definition of chemical warfare, the authors list, in the Notes on page 251, seven so-called official definitions. Their sources include the Army Dictionary, two Army manuals, two Congressional reports, instructional material from Dugway Proving Grounds, and a pamphlet from the U.S. Army Chemical School. Each definition was prepared for a different situation, and only the three which appeared in Department of

Army publications should be construed as official Army/military definitions. It is the authors' prerogative to define a term as used in the text, but they should better clarify the officiality of the supporting references.

A major problem in the attempt to limit the use of CB weapons has been the method of enforcing a treaty. If chemicals were used illegally, what retribution would be taken against the offender? If reprisals in kind are permitted, then each nation needs to develop an offensive capability in peacetime. This available capability might be considered by a potential aggressor as a means to assist in quickly overcoming his opponent. Since the act of war would probably be considered illegal, the use of an illegal weapon would not be of great concern. The only positive method of banning the use of CB weapons is to prohibit their possession by all countries. The problem then becomes how to enforce this prohibition. After World War I, Germany was prohibited from establishing a significant military force, yet Hitler was able to do so. This same problem is very much in the news today in connection with the Strategic Arms Limitation Talks. Until an effective method of enforcement is developed, chemical weapons will remain in the arsenal of many nations.

In view of the recent action by the U.S. Senate on the Geneva Protocol, this book presents a timely review of the legal status of the Protocol. The broad and general language of the Protocol has created disagreement as to exactly what is prohibited and against whom. Although many countries have ratified it, nearly half have acceded with reservations. Therefore, there is some doubt on the binding force between the early signatories and subsequent ratifications with reservations. The authors carefully supported their conclusion that the Geneva Protocol "does not constitute a completely legal obligation even between and among its signatories. It establishes a whole host of legal regimes which seem to be impossible to untangle."

The authors carefully reviewed the many attempts to limit the use of CB weapons and the deficiencies in each. The text clearly supports their conclusion that "the present state of international law is inadequate to govern the use of chemical or biological weapons in a limited or total war . . . [A]ny international and universal arms control negotiations on chemical and biological weapons should be cautiously approached and any resulting agreement

closely scrutinized and viewed with a certain amount of skepticism."

MAJOR GENERAL JOHN G. APPEL*

Military Law: A Handbook for the Navy and Marine Corps
LCDR Edward M. Byrne, United States Naval Institute
1970

Doubtless it was the hope of some that the sum and substance of military law could be contained in the handy one volume Manual for Courts-Martial, 1951. As the years passed and the law changed, the Manual remained the same. Whatever utility the volume may have had for the layman at the time of its publication had long since evaporated by the time it was superseded in 1969. Today the basic military law library contains the *Manual for Courts-Martial, 1969 (Rev. ed.)*, forty-three volumes of Court-Martial Reports and detailed service regulations on the subject of military law. The quantity, complexity and subtlety of the subject matter have served effectively to restrict the layman line officer's role in the military justice system. The military lawyer has been elevated from a desirable asset to a mandatory manpower requirement.

One of the more often voiced line officer laments is that the lawyers have tied his hands thus severely limiting his ability to maintain military discipline. Anyone who has worked with the system on a frequent basis is aware that this complaint stems from lack of understanding of the system rather than from fact.

Without attempting an apologia for the military lawyer—and more is needed—Lieutenant Commander Byrne has sought to put together a text for the layman line officers of the Naval Service, which if read in a thoughtful manner will go a long way toward easing that discomfort which stems from a lack of familiarity with the military justice system. In language which the layman can understand, the author has endeavored to dispel some of the mysteries surrounding military law by means of a chapter devoted to each of the important aspects of military justice procedure and the roles of the dramatis personnae. As a sort of bonus, two chapters dealing with administrative factfinding bodies have been included. For the more conscientious reader, self-administered quizzes are found at the end of each chapter.

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If the book can be said to have a major weakness it would be its dryness. This failing manifests itself in at least three different areas. First, if the author had incorporated some of the more notorious court-martial cases, which lend themselves so well as teaching aids, the readiability of the book would have been greatly enhanced. Secondly, the two-paragraph gloss of the mid-century reform of the military justice system deprives the line officer of the benefit of a historical conflict dating back to World War I. A discussion of the controversy which preceded the Military Justice Act of 1950, the reaction to the Act and the background of the Military Justice Act of 1968 would not only have been readable material but more importantly would have provided the context in which the changes were instituted as well as the reasons for the changes. Thirdly, the sections of the book relating to sentences and punishment are barren of augmentation of military philosophy or policy. This area, as much as any other, is in need of exposition for the line officer.

In spite of the criticisms noted above, the book must be considered as successful and a long overdue contribution in an area of legal writing heretofore sadly neglected. Whether the reader be a fresh caught ensign or salty captain he will find a wealth of helpful and indeed necessary information crammed into a few hundred pages. The sister services could do no worse than consider a similar publication for their line officers.

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*Mention of work in this section does not preclude later review in the *Military Law Review*.

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